

BOUND. MAR 20 '61

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
OCTOBER TERM, A. D. 1945

2/6/19

A

Term No. 4305

Agenda No.

THE FIRST NATIONAL BANK OF
JONESBORO, ILLINOIS, a
corporation,

Plaintiff-Appellee,

vs.

ROAD DISTRICT NO. 8, UNION
COUNTY, ILLINOIS,

Defendant-Appellant.

and

THE CLEAR CREEK DRAINAGE AND
LEVEE DISTRICT, UNION AND ALEXAN-
DER COUNTIES, ILLINOIS, THE
PRESTON LEVEE AND DRAINAGE DIST-
RICT, UNION COUNTY, ILLINOIS,
ROAD DISTRICT NO. 10, UNION
COUNTY, ILLINOIS AND ROAD DIST-
RICT NO. 11, UNION COUNTY,
ILLINOIS,

Defendants-Appellees

Appeal from the
Circuit Court of
Union County

326 I.A. 122

STONE, P. J.

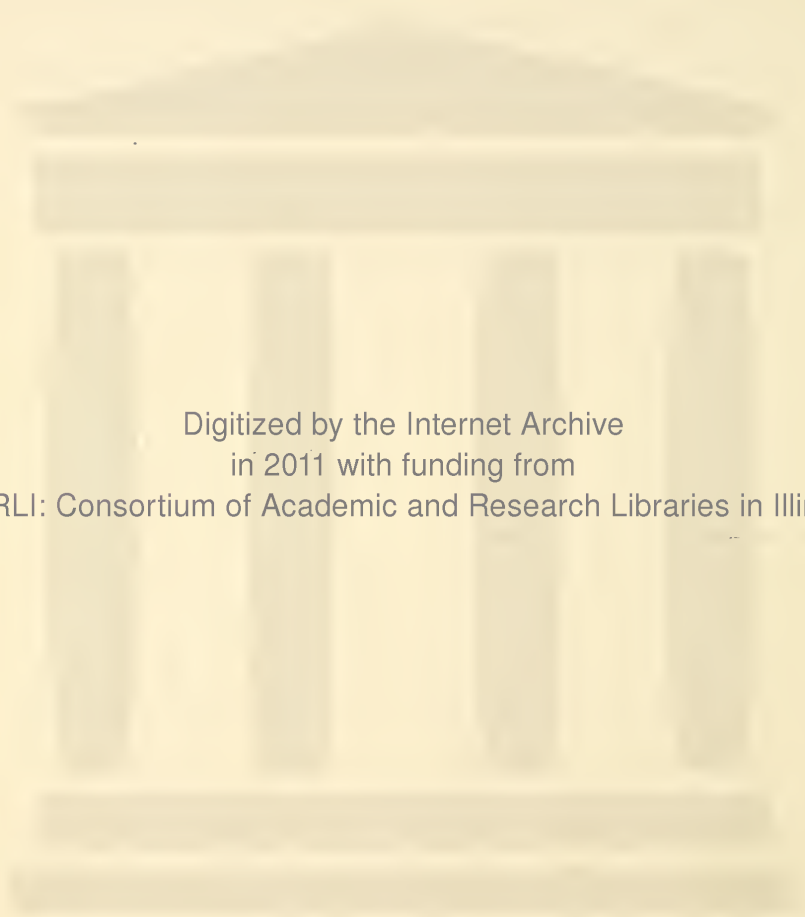
This is a suit in equity brought by The First National Bank of Jonesboro, Illinois, a corporation, Plaintiff-Appellee against Road District No. 8, Union County, Defendant-Appellant, and The Clear Creek Drainage and Levee District, Union and Alexander Counties, The Preston Levee and Drainage District, Union County, Road District No. 10, Union County, and Road District No. 11, Union County, Defendants-Appellees, to determine what disposition should be made of the sum of \$3,521.48 in the First National Bank of Jonesboro, in an account entitled "Road District No. 8, Drainage Fund." The bank sought to restrain Appellant, Road District No. 8 from proceeding with the prosecution of a suit at law, involving this sum of money, and prayed for a decree determin-

ing the ownership of said fund and directing disbursement. All of the various claimants to the fund were made parties defendant.

The facts out of which the controversy arose are set forth in the second amended complaint and admitted by all the parties to the suit. The Appellant, Road District No. 8, in the years 1915 and 1916 levied against the taxable property in the district the respective sums of \$2500.00 and \$1500.00, for "ditching to drain roads". The proceeds arising from the collection of the said taxes, amounting to the sum of \$2124.19 were segregated from the other funds of the district and by it on June 9, 1920 deposited in the special account above mentioned, which with an accumulation of interest thereon now amounts to a total sum of \$3,521.48. Prior to the levy and collection of said taxes, the appellee drainage districts and the Miller Pond Drainage District had levied against the said Road District No. 8 special assessments for benefits to the roads of said district by the drainage improvements constructed by the said drainage districts.

Subsequent to the levy and collection by Road District No. 8 of the taxes deposited in the above special account, there have been created by the county board of Union Count, appellees Road District No. 10 and Road District No. 11, each of which includes within its boundaries territory formerly constituting a part of Road District No. 8.

On October 24, 1941 a final decree was entered permanently enjoining the suit at law, and fixing the amount due the Clear Creek Drainage and Levee District at \$1,828.17; and Preston Levee and Drainage District at \$1,359.64; Road District No. 10, \$531.39 and Road District No. 11, \$1,002.06; that the total exceeded the amount of the fund in question; that after the payment of costs of the fund be apportioned to these parties, and that distribution be made by the bank accordingly. Road District No. 8 perfected an appeal to the Supreme Court of Illinois, and that Court holding



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that there was no question involved which would give that Court jurisdiction on direct appeal, the cause was transferred to this Court. First National Bank of Jonesboro vs. Road District #8, 382 Ill. 508. The appeal being dismissed by this court, (First National Bank vs. Road Dist. #8, 322 Ill. App. 293) and appeal being thereafter again prosecuted to the Supreme Court, and cause being remanded to this court, with directions to consider the assignments of error raised in the Supreme Court (First Nat. Bank vs. Road Dist. #8, 389 Ill. 156), the case comes again for consideration by this court.

In a brief of 264 pages, appellant alleges 42 errors relied upon for reversal of the finding, orders, judgments and decrees of the trial court. While a party has an undoubted right to make or file all necessary assignments of error, he should not increase their number unnecessarily. The practice of filing interminable or unnecessary assignments has been repeatedly disapproved by the courts and it has been said that "such interminable assignments, instead of impressing the court with the thought of an imperfect trial, rather cast discredit upon the worth of any of them". Chicago Great Western R. Co. vs. McDonough, 161 Fed. 657. While not adhering in its entirety to that theory, this court will endeavor to consider only the questions which, in its opinion, seem to be material to the judgment. Not all of the 42 assignments of error need be discussed separately.

The first fifteen assignments of error attack the rulings of the court made on questions of law raised by the pleadings. Out of a maze of voluminous pleading, which take up 229 pages of the abstract we ascertain that by special pleas, three general defenses were offered by appellant as against all appellees, namely laches, estoppel and the statute of limitation.

The Statute of Limitation is purely legal as contradistinguished from an equitable defense. 21 C. J. 251; Totten vs.

Totten, 294 Ill. 70; Whetsler et al vs. Sprague, 224 Ill. 461.

Both laches and estoppel depend upon the principle that it is inequitable to enforce a right because the party seeking to enforce the right has misled the other party and is responsible for his being in a position where he would now be greatly injured if the right were enforced. Whetsler et al vs. Sprague, supra. As to municipal corporations, the statute of limitations, laches and estoppel do not apply except as to private rights, and certainly would not apply against a municipal corporation whose officers have merely failed to act. The case of Logan County vs. City of Lincoln, 81 Ill. 156, is a case entirely in point. In that case the City of Lincoln sought to recover its share of tax money collected by the County, and the county urged the defenses of limitations, laches and estoppel; and the Court held that none of these defenses were available. In the instant case, the acts of appellees have only been in failing to act; that is, to enforce payment from the fund in question of the obligations of appellant. There has been no affirmative act that has caused appellant to assume a position such that it would now be inequitable to require them to change.

We are of the opinion that the trial court did not err in sustaining the motion to strike the special pleas of appellant, and we find no other reversible error in any order of the court in passing upon the multifarious pleadings in the case.

The appeal in this case was taken without a supersedeas and one of the errors assigned by appellant is the refusal of the trial judge to allow appellant, a municipal corporation, to appeal without bond. The objections to the granting of a supersedeas without bond was based on the contention on the part of appellees, that the appeal was a personal venture of the counsel for appellant, and that bond should be given as in cases of individuals. The mere refusal of a party's motion for supersedeas without bond is not subject to

review unless it appears that there is a clear abuse of the discretionary power lodged in the trial court. Anderson Transfer Co. vs. Fuller, 174 Ill. 221; City of Springfield vs. McCarthy 79 Ill. App. 388; Corbly vs. Corbly, 206 Ill. App. 527; McMahan vs. Trautvetter, 305 Ill. 395. We are of the opinion that there was no such abuse of discretion in the instant case. The record discloses no effort thereafter on the part of appellant to have a bond fixed by the court.

Complaint is made by appellant as to the Court's findings as to facts. These questions seem to be presented in the assignments of errors 27 to 33 inclusive. The trial judge saw and heard the witnesses and had advantages which an Appellate Court does not possess in judging of the weight which should be given to their testimony where there was conflict. Under the law and established rules or practice the conclusions of the trial judge should not be disturbed unless it clearly appears from the record that such conclusions are wrong. City of Quincy vs. Kemper 304 Ill. 303; Kuehne vs. Malach 286 Ill. 120; Podoski vs. Stone 186 Ill. 540; Wood vs. Price 46 Ill. 435; Marble vs. Marble, 304 Ill. 229.

Stripped of many of its unnecessary ramifications, the record shows that the fund in question is the result of a special levy included in the regular levy of Road District No. 8 for the purpose of paying the judgments obtained by the drainage district, the greater portion of which fund was set aside especially for this purpose and allowed to remain undisturbed for more than twenty years.

Inasmuch as this fund was never used for the purpose for which it was levied and collected, and the drainage assessments for which it was levied and collected to pay, had not been paid (except those paid by the said Road Districts) the trial court, we believe properly, as an equitable matter, decreed that the remaining assessments due the Drainage Districts be paid, and the Road Districts reimbursed for the portion of the said assessment so paid by them,

plus interest thereon; there not being sufficient money in said fund with which to pay the aforesaid amounts in full, the Court decreed that the same be pro rated to the said Drainage Districts and Road Districts in the ratio that the respective amounts due bears to the amount of said fund.

Assignments of error 17 to 23, inclusive, allege improper admission of evidence offered on behalf of Appellees. This includes objection to the testimony of the witness John E. Lingle, treasurer of the Preston Drainage District and also of the Clear Lake Drainage District, wherein he testified to certain records, as not being the best evidence; objection to Appellee's Exhibits 10 and 11, which were respectively Treasurer's statement regarding what his books show Road District #8 owes to Preston Drainage District; and Treasurer's statement regarding what his books show Road District No. 8 owes to Clear Lake Drainage District on the ground that these were hearsay; and the testimony of R. Wallace Karraker, attorney for Plaintiff-Appellees and for Defendant-Appellees, Drainage Districts, with reference to certain statements made by Paul D. Reese, during negotiations for a compromise of this matter.

It is well settled in chancery practice that where the competent evidence is sufficient to uphold the decree, the same will not be reversed on account of the admission of incompetent evidence, as the presumption is that the chancellor did not consider the evidence which was incompetent in arriving at his decision. *Barton vs. Hayden*, 199 Ill. App. 37.

In *Swift vs. Castle*, 23 Ill. 209, it was said by our Supreme Court; "The question presented upon the trial before the chancellor as well as in the Appellate Court, is, upon all the legitimate evidence in the cause, what decree should be rendered. The chancellor being the judge of both law and evidence, the presumption is, that in rendering his decree he will only regard that which is legal and pertinent. ***** It is the correct practice for the



chancellor, after the evidence is heard, to regard no portion of it which is immaterial or illegal, and to decide the case alone on the legal evidence adduced. It was also held in Treleaven vs. Dixon 119 Ill. 548, that "In chancery cases, the whole record, including all the evidence offered, is before us, and we are required to assume that all the incompetent evidence was rejected, and all the competent evidence was admitted and considered, on the final hearing. If there is competent evidence in the record sufficient to sustain the decree, it must be affirmed; if not, it must be reversed, and this without regard to whether the chancellor may have been right or wrong in his views as to the competency of the evidence at the hearing.

We are of the opinion that there was sufficient competent evidence in this record, to justify the decree of the trial court. Finding no reversible errors in the record, the decree of the Circuit Court of Union County will be affirmed.

AFFIRMED

CULBERTSON, J. and BARTLEY, J. CONCUR.

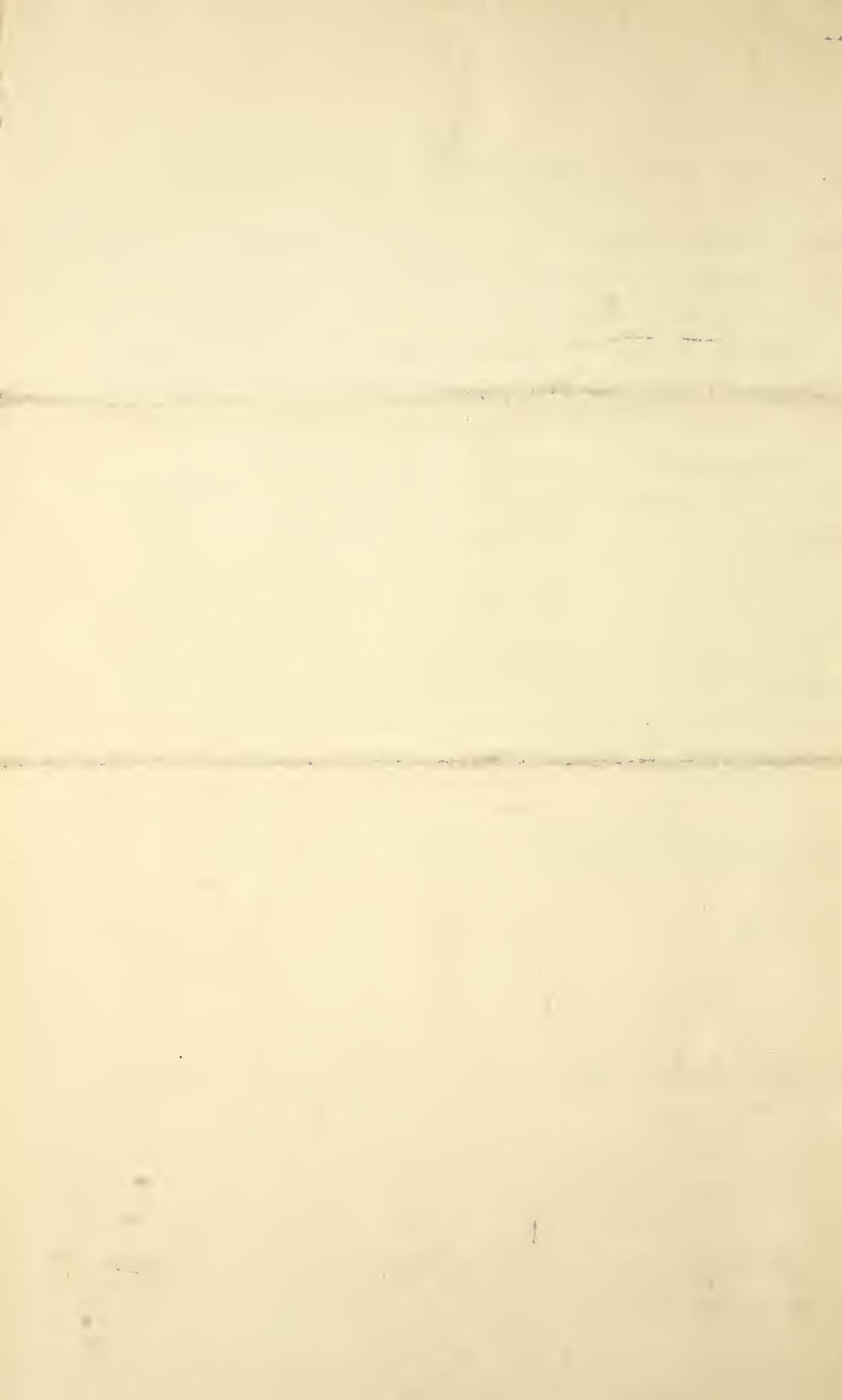
ABSTRACT.

FILED

FEB 6 1946

Stanley B. Brown

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



43283

GLEN T. ROGERS,

Plaintiff - Appellee,

v.

THE NEW YORK, CHICAGO & ST. LOUIS
RAILROAD COMPANY, a corporation,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

328 I.A. 123

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action under the Federal Employers' Liability Act. (45 U.S.C. 51). Verdict and judgment were for plaintiff in the amount of \$30,000. Defendant has appealed.

Plaintiff a resident of Frankfort, Indiana, began to work for defendant as an extra switchman in November of 1942. He was injured the night of April 5, 1943 in defendant's Frankfort Yard. As a result of the injury his left leg was amputated a few inches above the knee.

The Frankfort yard extends east and west for about a mile and a half. The trial was focused upon approximately 3,065 feet west of a cross track of the Monon Railroad. There are 15 tracks in the Yard. Counting from the north the first track, for most of the distance, is the "passing track." The second is the Lake Erie "main," hereinafter called the Main. The third is the "long" track. The "passing" track switches into the Main near the west end of the Yard. About 300 feet east of this switch point a cross over switch opens from the Main to the "long" track. South of the "long track" are the balance of the tracks. Further south are various railroad buildings, including the Yard office.

The Kemp Canning Factory, The Horton Oil Company building and the National Refining Company are, according to a map submitted with the briefs, respectively about 745 feet, 1250 feet and 1600

GLIN T. WOOD

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v.

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He was injured the night of April 5, 1943 in defendant's Frankfort

Yard. As a result of the injury his left leg was amputated a

few inches above the knee.

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feet west of a cross track of the Monon Railroad. There are 15

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most of the distance, is the "passing track." The second is the

Lake Erie "main," hereinafter called the Main. The third is the

"long" track. The "passing" track switches into the Main near

the west end of the Yard. About 300 feet east of this switch

point a cross over switch opens from the Main to the "long" track.

South of the "long track" are the balance of the tracks. Further

south are various railroad buildings, including the Yard office.

The Kamp Ginning Factory, The Horton Oil Company building

and the National Refining Company are, according to a map submitted

with the briefs, respectively about 745 feet, 1250 feet and 1800

feet west of the Monon cross track. They are north of the Yard. The Horton Building is on the west side of Myrtle Street, the first north and south street west of the Kemp Factory. The Refining Company building is at the west end of the same block as the Horton Building. A driveway adjoins it on the west. The driveway is a continuation of Hammond Street the next north and south street west of Myrtle Street. The north lines of these buildings are about the same distance north of the tracks.

At the time of the accident plaintiff lived on Morrison Street which is the first east and west street north of the tracks. His home was about a block and a half west of Hammond Street.

The issues made by the pleadings were whether plaintiff when injured "was working" or was a trespasser; whether he was called for duty in interstate commerce; whether defendant's employees on their way to the Yard Office customarily climbed between cars; whether any such custom was known and accepted by defendant; whether plaintiff was injured as a result of defendant's negligently starting a standing train with a violent jerk without signal or warning while plaintiff was climbing between the 12th and 13th cars after his peril was seen by defendant's brakeman, or as a result of plaintiff's conduct in trying to climb between cars of a moving train; and whether defendant owed plaintiff a duty under the circumstances.

Defendant contends the court committed error in denying its motions for directed verdict at the close of plaintiff's case and at the close of all the evidence and for judgment notwithstanding the verdict. It says there was no evidence tending to prove either that plaintiff was employed in interstate commerce at the time of the injury, or that defendant was negligent under the circumstances.

feet west of the Monon cross track. They are north of the Yard. The Horton Building is on the west side of Myrtle Street, the first north and south street west of the Loop factory. The Refining Company building is at the west end of the same block as the Horton Building. A driveway joins it on the west. The driveway is a continuation of Howard Street the next north and south street west of Myrtle Street. The north lines of these buildings are about the same distance north of the tracks.

At the time of the accident plaintiff lived on Harrison Street which in the first east and west street north of the tracks. His home was about a block and a half west of Howard Street. The issues were by the pleadings were whether plaintiff when injured "was working" or was a trespasser; whether he was called for duty in interstate commerce; whether defendant's employees on their way to the Yard Office negligently climbed between cars; whether any such custom was known and accepted by defendant; whether plaintiff was injured as a result of defendant's negligently starting a standing train with a violent jerk without signal or warning while plaintiff was climbing between the 14th and 15th cars after his car had been seen by defendant's brakeman, or as a result of plaintiff's conduct in trying to climb between cars of a moving train; and whether defendant owed plaintiff a duty.

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Defendant contends the court committed error in denying its motions for directed verdict at the close of plaintiff's case and at the close of all the evidence and for judgment notwithstanding the verdict. It says there was no evidence tending to prove either that plaintiff was employed in interstate commerce at the time of the injury, or that defendant was negligent under the circumstances.

According to plaintiff's testimony he was crossing the Yard on his way to defendant's Yard Office in response to a call for assignment to his railroad duties. He was, accordingly, at work. C. M. & St. P. R. Co. v. Kane, 33 Fed. Rep. (2) 866; Virginian Ry. Co. v. Early, 130 Fed. Rep. (2) 548; Erie R. R. Co. v. Winfield, 244 U. S. 170; Gidley v. Chicago Short Line R. R. Co., 346 Ill. 122.

In order to come under the Act plaintiff must show that part of his duties were in furtherance of, or in some way directly or closely and substantially affected, interstate commerce. 45 U. S. C. A. Sec. 51 as amended in 1939; Thomson v. Industrial Commission, 380 Ill. 386.

Plaintiff testified that he was called to report for the 10:30 P.M. job; that he had worked on that job a great many times; that the first assignment of that crew was to change the engine on Train No. 10; that the next assignment was a like performance on Train No. 9; and that both of these were interstate trains. Defendant says that if plaintiff was injured in the manner alleged, there was a mere expectation on his part that he would work on interstate commerce. It relies on Erie R. R. Co. v. Welsh, 242 U. S. 303, and many cases which followed its ruling, for the rule that mere expectation of employment in interstate commerce is not enough to bring an injured employee within the Act. Among others, we have read the following cases on the question whether plaintiff was, when injured, engaged in interstate commerce. Erie R. R. Co. v. Welsh, 242 U. S. 303; Erie R. R. Co. v. Winfield, 244 U. S. 170;

According to Plaintiff's testimony he was crossing the yard on his way to defendant's Yard Office in response to a call for assignment to his railroad duties. He was, accordingly, at work. U. S. v. R. R. Co., 25 Fed. Rep. (2) 242; Virginia Ry. Co. v. Kelly, 130 Fed. Rep. (2) 242; U. S. v. R. R. Co., 242 Ill. 102; U. S. v. R. R. Co., 242 Ill. 102.

In order to come under the act Plaintiff must show that part of his duties were in furtherance of, or in some way directly or closely and substantially affected, interstate commerce. U. S. v. R. R. Co., 242 Ill. 102; U. S. v. R. R. Co., 242 Ill. 102.

Plaintiff testified that he was called to report for the 10:30 P.M. job; that he had worked on that job a great many times; that the first assignment of that or was to change the engine on Train No. 10; that the next assignment was a like performance on Train No. 2; and that both of these were interstate trains. Defendant says that if Plaintiff was injured in the manner alleged, there was a mere expectation on his part that he would work on interstate commerce. It relies on U. S. v. R. R. Co., 242 Ill. 102, U. S. 308, and says cases which followed its ruling, for the rule that mere expectation of employment in interstate commerce is not enough to bring an injured employee within the Act. Among others, we have read the following cases on the question whether Plaintiff was, when injured, engaged in interstate commerce. U. S. v. R. R. Co., 242 Ill. 102; U. S. v. R. R. Co., 242 Ill. 102; U. S. v. R. R. Co., 242 Ill. 102.

Mease v. Reading Co., 191 Atl. 402; Reese v. Pennsylvania R. R. Co., 180 Atl. 188; Lowden v. Industrial Commission, 367 Ill. 596; C. & A. R. R. Co. v. Industrial Commission, 290 Ill. 599; Grand Trunk & Western Ry. v. Industrial Commission, 291 Ill. 167; Ill. Gen. Ry. v. Behrens, 233 U. S. 473; South Pacific Co. v. Industrial Commission, 113 Pac. (2) 763; Ermin v. Pennsylvania R. R. Co., 36 Fed. Supp. 936; Mitchell v. L. & N. R. R. Co., 375 Ill. 545; Vella v. Reading Co., 187 Atl. 495; Thomson v. Industrial Commission, 380 Ill. 386; Gidley v. Chicago Short Line Railway Co., 346 Ill. 122; Labor Board v. Jones & Laughlin, 301 U. S. 1.

The State cases cited generally involve the question whether the injury came under the Workmens' Compensation Acts or the Federal Employers Liability Act. In these cases the railroads were contending the Federal Act applied. Some were decided before, and some after, the 1939 Amendment to section 51 of the Act. This amendment was enacted to liberalize the Act so as to protect employees engaged interchangeably in interstate and intrastate commerce where, at the time of the injury, part of the employee's duties directly, closely and substantially affected interstate commerce. Ermin v. Pennsylvania R. R. Co., 36 Fed. Sup. 936; Southern Pacific Co. v. Industrial Commission, 113 Pac. (2) 763.

We think discussion of the various cases read would not be helpful in deciding this point. Plaintiff, when injured, was working. Actually, he had not begun his duties. He cannot be left in a vacuum. We must say either that he was working in interstate commerce or intrastate commerce. The parties stipulated at the trial that the 10:30 crew, the night of April 5th, engaged in both interstate and intrastate commerce. On this question of law we must make the inference favorable to plaintiff. We, therefore, hold that there was evidence tending to show he was engaged in interstate commerce.

Mease v. Reading Co., 191 Atl. 402; Reese v. Pennsylvania R. Co.,
180 Atl. 122; Lowen v. Industrial Commission, 257 Ill. 192;
G. & A. R. R. Co. v. Industrial Commission, 200 Ill. 92; Grand
Trunk & Western Ry. v. Industrial Commission, 201 Ill. 124; Ill. Gen.
Ry. v. Hehrer, 232 U. S. 473; South Pacific Co. v. Industrial
Commission, 113 Pac. (2) 752; Wright v. Pennsylvania R. Co., 38
Fed. Supp. 928; Michael v. I. & M. R. Co., 273 Ill. 242; Veris
v. Reading Co., 187 Atl. 492; Thermon v. Industrial Commission,
380 Ill. 322; Widley v. Chicago Short Line Railway Co., 246 Ill. 122;
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in both interstate and intrastate commerce. On this question of
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fore, hold that there was evidence tending to show he was engaged
in interstate commerce.

At the trial plaintiff relied upon defendant's general negligence and violation of its Rule 16.

Where an employee is injured in a switch movement and claims negligence through failure to give a signal, he must show that defendant's servants knew or had reason to believe that he was in a place of danger. Chesapeake & Ohio v. Mihal, 280 U. S. 102; Sunney v. Southern Railway Co., 89 Fed. (2) 437; and Fernald v. Boston & M. R. R., 62 Fed. (2) 782. Plaintiff testified that the night of the accident, after receiving the call to work, he entered the Yard and came to a freight train standing on the Main; that he spoke to a brakeman standing on the north side of the train and, according to custom and observed by the brakeman, he climbed between the cars and that, without warning, the train was moved suddenly as a result of which he was thrown and injured. We think this testimony tended to prove the general negligence.

Where an injured employee depends for recovery upon the violation of a custom or rule, he must show that he came within the custom or rule. Chesapeake & Ohio v. Mihal; Thomson v. Downey, 78 Fed. (2) 487; Reynolds v. N. Y. O. W. Ry. Co., 42 Fed. (2) 164; and Speirling v. C. E. & I. R. R. Co., 325 Ill. App. 576. Plaintiff testified that the course he followed after entering the Yard was customary for him and his fellow employees; that this custom was known to and accepted by the defendant; that defendant's rule No. 16 prescribed two short blasts of a whistle to signal the starting of a train from a standing position; that the rule was customarily complied with; and that the train was standing and suddenly moved without the whistle being blown. We think this testimony is ample to take to the jury the question whether defendant was negligent in violating rule No. 16.

At the trial Plaintiff relied upon defendant's general

negligence as violation of its Rule 18.

There is evidence as to what is a switch movement and

claims negligence through failure to give a signal, he must show

that defendant's servants knew or had reason to believe that he

was in a place of danger. Chesapeake & Ohio v. White, 280 U. S.

103; Conroy v. Southern Railway Co., 89 Fed. (2) 427; and Farnish

v. Eastern Ry. Co., 62 Fed. (2) 742. Plaintiff testified that

the night of the accident, after receiving the call to work, he

entered the yard and came to a freight train standing on the main;

that he spoke to a brakeman standing on the north side of the train

and, according to custom and observed by the brakeman, he climbed

between the cars and that, without warning, the train was moved

suddenly as a result of which he was thrown and injured. He

thinks this testimony tended to prove the general negligence.

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the custom or rule. Chesapeake & Ohio v. White; Thomson v. Conroy,

78 Fed. (2) 427; Raynolds v. N. Y. C. & H. R. Co., 42 Fed. (2) 164;

and Frederick v. D. & M. R. Co., 328 Ill. App. 576. Plaintiff

testified that the course he followed after entering the yard

was customary for him and his fellow employees; that this custom

was known to and accepted by the defendant; that defendant's rule

No. 18 prescribed two short blasts of a whistle to signal the

starting of a train from a standing position; that the rule was

automatically complied with; and that the train was standing and

suddenly moved without the whistle being blown. We think this

testimony is ample to take to the jury the question whether

defendant was negligent in violating rule No. 18.

On these several questions of law defendant points to testimony unfavorable to plaintiff and suggests unfavorable inferences from its cross-examination of plaintiff and from the wording of Rule 16. In deciding these questions, however, we consider only the favorable evidence and inferences.

Defendant also contends the verdict is against the manifest weight of the evidence on the questions of its negligence and plaintiff's employment in interstate commerce.

Plaintiff alleged that after informing defendant's brakeman of his purpose, he "commenced" to climb between the 12th and 13th cars of a standing freight train consisting of an engine and 75 cars and was injured when the train was started without warning. At the trial he testified that he crossed "the passing" track after entering the Yard along the west side of the Refining Building, came to the 70 car train standing on the Main, climbed through at a point about 15 or 20 cars from the engine and was injured a little west of the Refining Company. Plaintiff's attorney argued to the jury that plaintiff spoke to defendant's Brakeman Haas before mounting the train and was injured, not when the entire train was moved, but when at least the first ten cars west of Haas were moved.

Haas, according to undisputed testimony, was standing where the front cut of cars was uncoupled from the train. This point, according to the map submitted with the briefs was more than 1200 feet west of the place where plaintiff says he was injured, yet plaintiff's attorney in his argument locates plaintiff where Haas was standing. Haas stood about 120 feet east of the cross-over switch where the cut of cars was uncoupled. If plaintiff attempted to go through the train, 20 cars from the engine, he would have been 10 cars to the east of Haas and not less than 800 feet west of where he said he was injured.

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Plaintiff alleges that after informing defendant's

brakeman of his purpose, he "commenced" to climb between the 15th

and 15th cars of a standing freight train consisting of an engine

and 75 cars and was injured when the train was started without

warning. At the trial he testified that he crossed "the passing"

track after entering the Yard along the west side of the Refining

Building, came to the 75 car train standing on the Main, climbed

through at a point about 15 or 20 cars from the engine and was

injured a little west of the Refining Company. Plaintiff's

attorney argued to the jury that plaintiff spoke to defendant's

Brakeman Hase before mounting the train and was injured, not

when the entire train was moved, but when at least the first ten

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Hase, according to undisputed testimony, was standing

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over switch where the end of cars was uncoupled. If plaintiff

attempted to go through the train, 20 cars from the engine, he

would have been 10 cars to the east of Hase and not less than 800

feet west of where he said he was injured.

This divergence between plaintiff's allegations and proof and his attorney's argument is a serious one. Allowing for the prevailing darkness in the Yard, we still cannot reconcile the divergent theories. Where a plaintiff relies upon negligence, arising from facts which he alleges, he establishes a theory underlying his case. The case he presents to the jury should support that theory. His opponent has the right to expect such a presentation in preparing the defense. In this case, one theory was followed in proof and another in argument. Both cannot be reconciled with the evidence and physical facts. They are inconsistent with each other. If the accident happened as plaintiff's attorney argued to the jury, it could not have happened as plaintiff said it had. Plaintiff cannot have the advantage of Haas' location without the disadvantages. If he was injured where he says he was, he could not have been on the cut of cars which was moving. If he was injured in the movement of the cut of cars, he could not have been injured where he says he was. If we say that, because of his injury, he does not recall where the accident occurred, we cast a shadow over all of his testimony. In view of the distances which we have hereinbefore marked and will hereinafter refer to, we cannot be said to require undue precision. All of the defendant's employees who testified on the point, located the place of plaintiff's injury near the Canning Factory, at almost 800 feet east of where plaintiff says he was injured and more than 2,000 feet east of where plaintiff's attorney locates the injury. There is no theory that the train moved backward.

Plaintiff admitted saying in the pre-trial deposition of October, 1943 that he was injured at a point 250 yards from the Yard office as he was traveling on a line wouthwest from his home. He denied testimony of a conversation with a fellow employee after

This divergence between Plaintiff's allegations and proof and his attorney's argument is a serious one. Allowing for the prevailing darkness in the Yard, we still cannot reconcile the divergent theories. Where a Plaintiff relies upon negligence arising from facts which he alleges, he establishes a theory underlying his case. The case he presents to the jury should support that theory. His opponent has the right to expect such a presentation in preparing the defense. In this case, one theory was followed in proof and another in argument. Both cannot be reconciled with the evidence and physical facts. They are inconsistent with each other. If the accident happened as Plaintiff's attorney argued to the jury, it could not have happened as Plaintiff said it had. Plaintiff cannot have the advantage of both 'Location without the disadvantages. If he was injured where he says he was, he could not have been on the east of cars which was moving. If he was injured in the movement of the east of cars, he could not have been injured where he says he was. If we say that, because of his injury, he does not recall where the accident occurred, we cast a shadow over all of his testimony. In view of the distances which we have hereinbefore marked and will hereinafter refer to, we cannot be said to require undue precision. All of the defendant's employees who testified on the point, located the place of Plaintiff's injury near the Lanning Factory, at almost 800 feet east of where Plaintiff says he was injured and more than 2,000 feet east of where Plaintiff's attorney locates the injury. There is no theory that the train moved backward.

Plaintiff admitted saying in the pre-trial deposition of October, 1943 that he was injured at a point 250 yards from the Yard office as he was traveling on a line southwest from his home. He denied testimony of a conversation with a fellow employee after

being discharged from the hospital that he was hurt at a point near the Canning Factory, "going through" a moving train. He denied testimony of defendant's claim agent and a court reporter of a statement by him April 12th that he was injured when the moving train started to stop. He said he did not recall saying then he was not sure whether he went between the oil barns and the Canning Factory or west of the oil barns, and did not remember saying he crossed the "stock" track. This track was north of the "passing" track for several hundred feet. It began east of the Canning Factory. Plaintiff admitted at the trial that the "stock" track did not extend as far west as the path alongside the Refinery. He said he did not recall saying in the April 12th statement that the train was going west. He denied saying it was going 12 or 15 miles an hour. He did not recall saying he was 12 or 15 cars back of the engine, or that he was going to ride on the train just long enough to cross the track, or that one gets careless working around "that stuff", or that 10 or 12 cars had passed him after the accident.

We recognize that the credibility of witnesses is for the jury and that this question includes the consideration of plaintiff's impeachment by previous statements and testimony. There were other factual disputes such as what time plaintiff was called, and for what job, and whether he was conscious or unconscious after the accident. We need not consider these matters, however, for in view of what we have already said, the judgment must be reversed and the cause remanded since the verdict is against the manifest weight of the evidence.

In aid of a new trial we wish to point out that we see no error in the trial court's refusal to submit interrogatories Nos. 3 and 4 tendered by the defendant.

being discharged from the hospital that he was hurt at a point near the Gannan factory, "going through" a moving train. He denied testimony of defendant's claim agent and a court reporter of a statement by him April 15th that he was injured when the moving train started to stop. He said he did not recall saying then he was not sure whether he went between the oil barrels and the Gannan factory or west of the oil barrels, and did not remember saying he crossed the "stock" track. This track was north of the "passing" track for several hundred feet. It began east of the Gannan factory. Plaintiff admitted at the trial that the "stock" track did not extend as far west as the path alongside the refinery. He said he did not recall saying in the April 15th statement that the train was going west. He denied saying it was going 12 or 15 miles an hour. He did not recall saying he was 12 or 15 cars back of the engine, or that he was going to ride on the train just long enough to cross the track, or that one gate car was working around "that stuff", or that 10 or 12 cars had passed him after the accident.

He recognizes that the credibility of witnesses is for the jury and that this question includes the consideration of plaintiff's impeachment by previous statements and testimony. There were other factual disputes such as what time plaintiff was called, and for what job, and whether he was conscious or unconscious after the accident. We need not consider these matters, however, for in view of what we have already said, the judgment must be reversed and the cause remanded since the verdict is against the manifest weight of the evidence.

In aid of a new trial we wish to point out that we see no error in the trial court's refusal to admit interrogatories Nos. 3 and 4 tendered by the defendant.

We also wish to point out that, after plaintiff's case was in, plaintiff was given leave to amend his complaint so as to make more specific subparagraph 11 (b). After all the evidence was in and the instructions were under discussion, plaintiff's attorney in objecting to instructions offered by defendant as to the charges in paragraphs 11 (b) and 11 (c), said there was no need of those instructions since the charges in those paragraphs were abandoned. The verdict was returned January 12, 1944. January 22nd, defendant moved for judgment notwithstanding the verdict. May 15th the court granted plaintiff leave to file the amendment to subparagraph 11 (b). June 23rd, defendant's motion for judgment was denied and judgment for plaintiff entered.

Amendment may be made after verdict or judgment to conform the pleadings and proof. In this case, however, an amendment was permitted to a paragraph which had been abandoned. On the basis of the abandonment, two instructions offered by defendant appear to have been refused. No complaint is made of this. We simply point out the condition of the record.

Judgment of the Superior Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

LEWE AND BURKE, JJ. CONCUR.

we also wish to point out that, after Plaintiff's case was in, Plaintiff was given leave to amend his complaint so as to make more specific subparagraph 11 (b). After all the evidence was in and the instructions were under discussion, Plaintiff's attorney in objecting to instructions offered by Defendant as to the charges in paragraphs 11 (b) and 11 (c), said there was no need of these instructions since the charges in these paragraphs were abandoned. The verdict was returned January 12, 1944. January 22nd, Defendant moved for judgment notwithstanding the verdict. May 15th the court granted Plaintiff leave to file the amendment to subparagraph 11 (b). June 19th, Defendant's motion for judgment was denied and judgment for Plaintiff entered.

Amendment may be made after verdict or judgment to conform the pleading and proof. In this case, however, an amendment was permitted to a paragraph which had been abandoned. On the basis of the abandonment, two instructions offered by defendant appear to have been refused. No complaint is made of this. We simply point out the condition of the record.

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JUDGMENT REVERSED AND CAUSE REMANDED.

LESLIE AND HENRY, JJ. CONCUR.

43305

RAY F. SCHUSTER and RUTH M.
SCHUSTER,

Appellants,

v.

JEFFERSON ICE COMPANY, a corporation,
and BEN RIEKEN,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

328 I.A. 124

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF
THE COURT.

This is an action to recover for personal injuries and property damage arising out of a collision on September 26, 1942, between plaintiffs' automobile and defendants' truck. Verdicts and judgment were for defendants, and plaintiffs have appealed.

Plaintiffs, with Ray Schuster driving, left home in Western Springs, Illinois in their 1942 Ford coupe for Madison, Wisconsin. Rain and mist prevailed and the pavement was wet as they drove northwest on U. S. Highway No. 14, approaching Crystal Lake, Illinois. As they came to about the center of a long curve leading under the Chicago & Northwestern R. R. viaduct, their car and the Ice Company's truck-trailer driven by Rieken bound southeast, collided. Plaintiffs' car veered northwest off of the road on to a dirt shoulder and into a rail guarding the north boundary of the highway and was deflected southwest where it came to rest about 100 feet east of the viaduct. The truck-trailer proceeded southeast about 200 feet after the collision. Both plaintiffs were injured and their automobile badly damaged.

In their complaint they charge the defendants with negligence in driving at an unreasonable speed and on the wrong side of the curved road in violation of Par. 146 (a), (b), subparagraph 4 (5c), and Pars. 151, 152 and 155 of the Motor Vehicle Act (Chap. 95½, Ill. Rev. Stats.). Defendants made issue of these charges.

RAY F. SCHUSTER and RUTH M. SCHUSTER,
Appellants,

v.

TERRESON ICE COMPANY, a corporation,
and BEN RIKKEN,

Appellees.

SUPREME COURT

DOUG COUNTY.

3281 A. 124

MR. PRESIDING JUSTICE KELLY DELIVERED THE OPINION OF

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This is an action to recover for personal injuries and property damage arising out of a collision on September 26, 1942, between plaintiffs' automobile and defendants' truck. Verdicts and judgment were for defendants, and plaintiffs have appealed. Plaintiffs, with Ray Schuster driving, left home in Western Springs, Illinois in their 1942 Ford coupe for Madison, Wisconsin. Rain and mist prevailed and the pavement was wet as they drove northwest on U. S. Highway No. 14, approaching Crystal Lake, Illinois. As they came to about the center of a long curve leading under the Chicago & Northwestern R. R. viaduct, their car and the Ice Company's truck-trailer driven by Rikken bound southeast, collided. Plaintiffs' car veered northwest off of the road on to a dirt shoulder and into a rail guarding the north boundary of the highway and was deflected southwest where it came to rest about 100 feet east of the viaduct. The truck-trailer proceeded southeast about 200 feet after the collision. Both plaintiffs were injured and their automobile badly damaged.

In their complaint they charge the defendants with negligence in driving at an unreasonable speed and on the wrong side of the curved road in violation of Par. 1-6 (a), (b), and paragraph 4 (5c), and Par. 1-6, 1-8 and 1-9 of the Motor Vehicle Act (Chap. 95, Ill. Rev. Stat.). Defendants made issue of these charges.

Rieken testified that he was "coasting" down the highway about 20 miles an hour. The highway inclined slightly to the east. Ray Schuster testified that it was "pretty hard" to judge speed within 10 miles of the actual rate. He said he would not care to judge the speed of the truck. Ruth Schuster "did not particularly see the truck approaching." Marian Marvil, plaintiff's witness, gave as her opinion of the truck-trailer's speed 40 miles per hour. She was, according to her testimony, "10 or 14", "15 or 20" feet to the rear of plaintiff's car on the curve. We cannot say the jury should have found that the truck-trailer at the time of the accident was being driven at an unreasonable rate of speed.

Rieken says he did not decrease his speed while going about the curve. Plaintiffs seize on this testimony as support for their claim that defendant violated paragraph 146 of the Act, by failing to slow down as he rounded the curve. We do not agree that, under the circumstances of this case, the jury was required to find defendant negligent in not reducing the speed below 20 miles an hour as he drove around the curve.

At the place where the collision occurred the highway is 20 feet wide. The black center line divides it into two 10 foot lanes. The inside or southeast edge is about 15 inches lower than the outside or northwest edge. This point is about the center of the curve. The curve here, according to the testimony and exhibits, is sharper. It is obvious that if plaintiff's Ford and the entire truck-trailer passed each other while each was on its own side of the highway, the collision would not have occurred. Since it did occur, one of them encroached in some way upon the lane for traffic going in the opposite direction. The question of which one so encroached was the crucial question of fact in the case.

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Rieken says he did not decrease his speed while going about the curve. Plaintiff's case on this testimony as support for their claim that defendant violated paragraph 143 of the Act, by failing to slow down as he rounded the curve. We do not agree that, under the circumstances of this case, the jury was required to find defendant negligent in not reducing the speed below 20 miles an hour as he drove around the curve.

At the place where the collision occurred the highway is 20 feet wide. The black center line divides it into two 10 foot lanes. The inside or southeast edge is about 15 inches lower than the outside or northwest edge. This point is about the center of the curve. The curve here, according to the testimony and exhibits, is sharper. It is obvious that if Plaintiff's Ford and the entire truck-trailer passed each other while each was on its own side of the highway, the collision would not have occurred. Since it did occur, one of them encroached in some way upon the lane for traffic going in the opposite direction. The question of which one so encroached was the crucial question of fact in the case.

At the trial Ray Schuster testified that he observed the truck-trailer approach and that it and the Ford were in their proper lanes in the highway, and that they passed and that is all he remembers. His wife testified that they were traveling about 35 miles an hour on the right side of the highway and that their car passed the cab of the truck and that the trailer struck their car and "we were swept right off the road * * *." Marian Marvil testified that she was driving her car to the rear of plaintiffs' for about 10 or 15 miles; that she was driving about 35 miles an hour and that the two cars kept about the same relative distance; that going about the turn plaintiffs' car was about "10 or 14" or "15 or 20" feet ahead of witness' car; that the truck came down the "incline rather fast"; that the impact occurred at the "angle" of the curve; and that the trailer "lurched" over into the north-westbound lane and struck plaintiffs' car, throwing it off the road into the guard rail.

Rieken testified that the trailer was 8 feet wide; that he was driving about 6 inches from the south edge of the highway; that the Ford came toward him "pretty fast and it straddled" the black center line of the highway and as it came closer the front end was "cutting into me;" that the truck passed the Ford and that all he knew was that something hit the trailer, as though someone had thrown a stone against it and that he stopped and discovered the accident and that "no part of my outfit" deviated from the right side of the road.

Plaintiffs were corroborated by the testimony of Witness Marvil that, at the time of the collision, the Ford was on the right side of the highway. In his pretrial deposition Rieken stated that when he first observed Schuster's car it was in the proper lane and that when it passed him, it was in its proper lane but coming toward

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truck-trailer approach and that it and the Ford were in their proper lanes in the highway, and that they passed and that is all he remembers. His wife testified that they were traveling about 35 miles an hour on the right side of the highway and that their car passed the cab of the truck and that the trailer struck their car and "we were swept right off the road * * *". Marian Anelli testified that she was driving her car to the rear of plaintiff's car for about 10 or 15 miles; that she was driving about 35 miles an hour and that the two cars kept about the same relative distance; that going about the turn plaintiff's car was about "10 or 14" or "15 or 20" feet ahead of witness' car; that the truck came down the "incline rather fast"; that the impact occurred at the "angle" of the curve; and that the trailer "lunched" over into the north-westbound lane and struck plaintiff's car, throwing it off the road into the guard rail.

Rixen testified that the trailer was 8 feet wide; that he was driving about 3 inches from the south edge of the highway; that the Ford came toward him "pretty fast and it straddled" the black center line of the highway and as it came closer the front end was "cutting into me"; that the truck passed the Ford and that all he knew was that something hit the trailer, as though someone had thrown a stone against it and that he stopped and discovered the accident and that "no part of my outfit" deviated from the right side of the road.

Plaintiffs were corroborated by the testimony of witnesses

Anelli that, at the time of the collision, the Ford was on the right side of the highway. In his pretrial deposition Rixen stated that when he first observed Schuster's car it was in the proper lane and that when it passed him, it was in its proper lane but coming toward

the black center line. He also stated that, going around the curve he had to watch his truck and did not know where the Schuster automobile was with reference to the black line. It will be seen that this testimony is somewhat different than that given by him at the trial. At the trial he said he saw the plaintiffs' car after he was 125 or 150 feet out from the viaduct. In the pre-trial deposition his testimony was that his first view of the car was as he came from under the viaduct.

It might seem in view of the differences in defendants' testimony, before and at the trial, that the witness Marvill's testimony should weigh the scale in plaintiffs' favor. The jury, however, may have considered improbable her testimony that she was driving 35 miles per hour over the wet pavement, turning the curve at a distance of only "10 to 14", "15 or 20" feet to the rear of plaintiffs' car. The jury may have believed that if she were that close she hardly could have avoided the truck-trailer which did not hit her car "so far as I know" and plaintiffs' veering car. The jury may have, in this view, further believed that if she were much farther to the rear at the point of impact, her position for accurate perception of the rear of the truck-trailer was not very good.

It is true that the skid marks were found only north of the center line. They are not so located, however, so as to make the jury's verdict unwarranted. Photographs in evidence, taken by Ray Schuster show that the center of the left side of his car bore the brunt of the impact. There is only one picture of the front of the car. This shows damage to the left headlight at a point level with the damage to the left rear mudguard of the trailer. There were no pictures available of the side of the left front fender of plaintiffs' car. We believe this evidence of the physical damage is consistent with defendants' theory of the accident.

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were that close she hardly could have avoided the truck-trailer which did not hit her car "so far as I know" and plaintiff's version. The jury may have, in this view, further believed that if he were much farther to the rear at the point of impact, her position for accurate perception of the rear of the truck-trailer was not very good.

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In conclusion we believe that the verdict was not against the manifest weight of the evidence.

The plaintiffs complain that the judgment should be reversed because of error in the giving of certain instructions for defendants.

Instruction No. 9 told the jury they were not bound to believe something to be a fact merely because a witness so stated, provided, from all the facts and circumstances of the case, the jury believed otherwise. Plaintiffs criticize this instruction for unduly singling out the Witness Marvil, for use of the term "merely" and because the jury is not limited to the evidence in the case. We see no merit in the first criticism, nor the second. Stollery v. Sprague, 301 Ill. App. 209. In support of the third, plaintiffs rely upon Ryan v. The People, 122 Ill. App. 461. In that case an instruction similar to this was disapproved. The word "facts" in the instant instruction, however, makes it more acceptable, although the term "circumstances" might be misleading. Moreover, in the Ryan case the reversible error was found not in giving the instruction similar to the one here, but in the giving of another.

Instruction No. 12 is similar to the "5th instruction" set out in U. S. Brewery v. Stoltenberg, 211 Ill. 535. These instructions sought to state the law as to direct and circumstantial evidence. Defendants here substituted the words, "is sufficient to warrant a reasonable conclusion that the fact in dispute is true" for the words in the instruction in that case, "constitute a preponderance of the evidence." We cannot approve the instruction as modified by defendants, but it seems clear that plaintiffs were not harmed by the giving of it. Instruction 13 is not well drawn.

In conclusion we believe that the verdict was not

against the manifest weight of the evidence.

The plaintiff's complaint that the judgment should be

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Instruction No. 9 told the jury they were not bound to

believe something to be a fact merely because a witness so stated,

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jury believed such things. Plaintiff criticizes this instruction

for unfairly singling out the witness as evil, for use of the term

"merely" and because the jury is not limited to the evidence in

the case. We see no merit in the first criticism, nor the second.

Geoffrey v. Foreman, 301 Ill. App. 302. In support of the third,

plaintiffs rely upon Van v. The People, 121 Ill. App. 431. In

that case an instruction similar to this was disapproved. The

word "facts" in the instant instruction, however, makes it more

acceptable, although the term "circumstances" might be misleading.

Moreover, in the Van case the reversible error was found not in

giving the instruction similar to the one here, but in the giving

of another.

Instruction No. 10 is similar to the "5th instruction"

set out in W. E. Foreman v. Geoffrey, 311 Ill. 525. These

instructions sought to state the law as to direct and circumstantial

evidence. Defendants have submitted the words, "is sufficient to

warrant a reasonable conclusion that the fact in dispute is true"

for the words in the instruction in that case, "constitute a pre-

ponderance of the evidence." We cannot approve the instruction as

submitted by defendants, but it seems clear that plaintiffs were

not harmed by the giving of it. Instruction 10 is not well drawn.

We do not believe, however, that the giving of it was error. No other instruction was offered or given defining "proximate cause" and this instruction did not define the term well, but we believe the jury could understand the definition given.

Plaintiffs complain of the giving of instruction No. 18. It told the jury to take into consideration, in determining how much credence to give plaintiffs' evidence, "that they are plaintiffs and interested in the result of the suit, in determining the question of whether or not the defendant Jefferson Ice Company is guilty." Minus the italicized words, this instruction has been approved where the defendant was a corporation and ^{plaintiff the} ~~the~~ only witness entitled to receive or be liable for the payment of money. G. & E. I. R. R. Co. v. Burrige, 211 Ill. 9. It has been condemned where defendants are natural persons only (Engstrom v. Olson, 248 Ill. App. 480), and where there is a corporate and natural defendant and both the plaintiff and natural defendant testify. Doellefield v. Travelers Ins. Co., 303 Ill. App. 123. In the Olson case the giving of the instruction was not the principal error upon which reversal rested. In the Doellefield case another instruction told the jury it should not discredit defendant's testimony "from caprice or merely because he is defendant." In the instant case instructions 15 and 16 instructed the jury generally as to the bias interest, etc. of witnesses. Sued alone, the corporate defendant would have been entitled to the instruction. Plaintiff joined Rieken as co-defendant. The italicized words, apparently sought to limit the instruction to the Ice Company. We cannot say that the instruction given misled the jury nor prejudiced plaintiffs in view of this record.

Instruction No. 22 told the jury that each plaintiff was duty bound to exercise ordinary care to look out for danger and to avoid injury as the truck driver was, and that one was not held in

We do not believe, however, that the giving of it was proper. No other instruction was offered or given containing "qualifying words" and this instruction did not define the term well, but we believe the jury would understand the definition given.

Plaintiff complains of the giving of instruction No. 13.

It told the jury to take into consideration, in determining how much damages to give Plaintiff's evidence, "that they were Plaintiff's and interested in the result of the suit, in determining the question of whether or not the defendant's action was negligent or not."

Minus the italicized words, this instruction has been approved where Plaintiff the defendant was a corporation and the witness entitled to receive on the liable for the payment of money. 100 Ill. App. 2d 100.

7. Illinois, 111 Ill. 2d 111. It has been contended that defendant

are natural persons only (Illinois v. Smith, 248 Ill. 2d 111, 110.)

and were held as a corporation and natural defendant and both the Plaintiff and natural defendant testify. Illinois v. Travelers

Ins. Co., 203 Ill. 2d 111, 112. In the Illinois and the view of the

instruction was not the principal error upon which reversal rested.

In the Illinois case another instruction told the jury it should not disregard defendant's testimony "from evidence or merely because

he is defendant." In the instant case instructions 10 and 11 instructed

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Next, again, the corporate defendant would have been entitled to the

instruction. Plaintiff joined in co-defendant. The

italicized words, apparently meant to limit the instruction to the

jury. We would say that the instruction given misled the

jury not prejudicially in view of this record.

Instruction No. 12 told the jury that each Plaintiff was

entitled to exercise ordinary care to look out for danger and to

avoid injury on the truck driver was, and that one was not held in

any higher degree of care in the law than was the other. This instruction was poorly drawn and may not have been clear. The words, "look out for danger" should have been omitted. Instructions No. 20 and 23, however, clearly outlined the meaning of the ordinary care required of plaintiff.

We find no reversible error in the instructions criticized.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE AND BURKE, JJ. CONCUR.

any light degree of error in the first two cases. The instructions are nearly true and may have been altered. The words, "look out for danger" would have been omitted. In the third case, 20 and 21, however, clearly outlined the meaning of the ordinary case required to be identified.

There is no record of any other persons being arrested or charged with the same offense.

16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851

[illegible]

We do not believe, however, that the giving of it was error. No other instruction was offered or given defining "proximate cause" and this instruction did not define the term well, but we believe the jury could understand the definition given.

Instruction No. 22 told the jury that each plaintiff was duty bound to exercise ordinary care to look out for danger and to avoid injury as the truck driver was, and that one was not held in any higher degree of care in the law than was the other. This instruction was poorly drawn and may not have been clear. The words, "look out for danger" should have been omitted. Instructions No. 20 and 23, however, clearly outlined the meaning of the ordinary care required of plaintiff.

We find no reversible error in the instructions criticized. For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE AND BURKE, JJ. CONCUR.

We do not believe, however, that the giving of it was error. No other instruction was offered or given defining "proximate cause" and this instruction did not define the term well, but we believe the jury could understand the definition given.

Instruction No. 22 told the jury that each plaintiff was duty bound to exercise ordinary care to look out for danger and to avoid injury as the truck driver was, and that one was not held in any higher degree of care in the law than was the other. This instruction was poorly drawn and may not have been clear. The words, "look out for danger" should have been omitted. Instructions No. 20 and 25, however, clearly outlined the meaning of the ordinary care required of plaintiff.

We find no reversible error in the instructions criticized. For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWIS AND CLARK, JR. COUNSEL

43309

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

AMANTE RONGETTI,

Plaintiff in Error.

ERROR TO

COUNTY COURT

COOK COUNTY.

320 I.A. 124²

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a five count information filed in the County Court of Cook County, Amante Rongetti was charged with violating provisions of Sec. 24 of the Medical Practice Act, (Sec. 161., Ch. 91, Ill. Rev. Stat. 1945). A motion to quash the information was overruled. Thereupon he pleaded not guilty. The case was tried before the court and a jury. The court directed a verdict for the defendant as to Counts 3 and 4 and denied motions for a directed verdict as to Counts 1, 2 and 5. Count 1 alleged that defendant diagnosed, or attempted to diagnose, the ailment of Louis Janczak as kidney trouble. Count 2 alleged that defendant did prescribe a large quantity of distilled water for the supposed kidney trouble of Louis Janczak. Count 5 charged that defendant maintained an office at 2900 West Van Buren Street, Chicago, equipped with a stethoscope, a blood pressure apparatus, a physicians' examining table, a sterilizing cabinet and bottles containing unknown ingredients. The jury found defendant guilty as charged in Counts 1, 2 and 5. Motions for a new trial and in arrest of judgment were denied and judgment was entered on the verdict. Defendant was sentenced to serve 90 days in the common jail of Cook County and to pay a fine of \$300 and costs of court. He brings the case here by writ of error.

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

AMANTE HONGETTI,

Plaintiff in Error.

KNOW TO

COUNTY COURT

COOK COUNTY.

383.1.A.124

MR. JUSTICE LUTKIN DELIVERED THE OPINION OF THE COURT.

In a five count information filed in the County Court

of Cook County, Amante Hongetti was charged with violating pro-

visions of Sec. 24 of the Medical Practice Act, (Sec. 141, Ch.

91, Ill. Rev. Stat. 1945). A motion to quash the information

was overruled. Thereupon he pleaded not guilty. The case was

tried before the court and a jury. The court directed a verdict

for the defendant as to Counts 3 and 4 and denied motions for a

directed verdict as to Counts 1, 2 and 5. Count 1 alleged that

defendant diagnosed, or attempted to diagnose, the ailment of

Louis Janasz as kidney trouble. Count 2 alleged that defendant

did prescribe a large quantity of distilled water for the supposed

kidney trouble of Louis Janasz. Count 3 charged that defendant

maintained an office at 2300 West Van Buren Street, Chicago,

equipped with a stethoscope, a blood pressure apparatus, a

physicians' examining table, a sterilizing cabinet and bottles

containing unknown ingredients. The jury found defendant guilty

as charged in Counts 1, 2 and 5. Motions for a new trial and

in arrest of judgment were denied and judgment was entered on

the verdict. Defendant was sentenced to serve 90 days in the

common jail of Cook County and to pay a fine of \$300 and costs

of court. He brings the case here by writ of error.

Defendant urges that Counts 1, 2 and 5 should have been quashed. The information in the instant case is almost identical in form with those in People v. Shaver, 367 Ill. 339, People v. Spenoer, 369 Ill. 57; People v. Paderewski, 373 Ill. 197; People v. Moe, 381 Ill. 235; People v. Kabana, 383 Ill. 284. The objections now urged were made in those cases and the same authorities used to sustain the claim that no crime was properly charged, and such contentions were denied. No error was committed in holding the information good.

Defendant maintains that the court erred in permitting immaterial and irrelevant testimony on behalf of the People and in denying the motion to direct a verdict for the defendant. He also insists that the verdict and judgment are contrary to the law and evidence and that the court erred in denying his motions for a new trial and in arrest of judgment. Arguing these points, defendant states that the testimony of the complaining witness, Janczak, gave his opinion as to a technical subject of which he had no knowledge. The testimony of this witness was confined to what he saw and heard. He described the furnishings of the office in terms that any layman would understand. He described the blood pressure equipment and the manner in which it was used. The other equipment described is within the common knowledge of the average layman. The court did not err in denying defendant's motion for a directed verdict. We are of the opinion that the judgment and verdict are amply supported by the evidence. The judgment is not contrary to the law or the evidence and the court did not err in overruling defendant's motions for a new trial and in arrest of judgment.

Therefore, the judgment of the County Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND LEWE, J. CONCUR.

Defendant urges that Counts 1, 2 and 3 should have been dismissed. The information in the instant case is almost identical in form with those in People v. Sawyer, 387 Ill. 332; People v. Spencer, 389 Ill. 67; People v. Rydzewski, 373 Ill. 137; People v. Lee, 381 Ill. 338; People v. Kahan, 383 Ill. 284. The objections now urged were made in those cases and the same authorities used to sustain the claim that no crime was properly charged, and such contentions were denied. No error was committed in holding the information good.

Defendant insists that the court erred in permitting immaterial and irrelevant testimony on behalf of the People and in denying the motion to direct a verdict for the defendant. He also insists that the verdict and judgment are contrary to the law and evidence and that the court erred in denying his motions for a new trial and in arrest of judgment. Among these points, defendant states that the testimony of the complaining witness, Janaszak, was his opinion as to a technical subject of which he had no knowledge. The testimony of this witness was confined to what he saw and heard. He described the furnishings of the office in terms that any layman would understand. He described the blood pressure equipment and the manner in which it was used. The other equipment described is within the common knowledge of the average layman. The court did not err in denying defendant's motion for a directed verdict. We are of the opinion that the judgment and verdict are amply supported by the evidence. The judgment is not contrary to the law or the evidence and the court did not err in overruling defendant's motions for a new trial and in arrest of judgment.

Therefore, the judgment of the County Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILLY, P. J. AND JUST. J. CONCUR.

43428

In the Matter of the Estate of
GUSSIE TEICHMAN, formerly known
as GUSSIE BOLLER, Deceased,

BENJAMIN TEICHMAN, as Executor,
Petitioner in Citation Proceedings,

Appellant,

v.

SARAH WEINBERG and MORRIS WEINBERG,

Respondents - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

328 I.A. 125

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Gussie Teichman, also known as Gussie Boller, died at Chicago on June 6, 1944. Letters testamentary were issued out of the Probate Court of Cook County on July 28, 1944 to Benjamin Teichman, as executor of her last will and testament. The executor filed a verified petition charging that Morris Weinberg and Sarah Weinberg "have in their or his or her possession or control" a note executed by Fred B. Lee and Cordelia Lee dated April 1, 1941, to the order of bearer in the principal sum of \$6,000, bearing interest at six percent per annum, a trust deed securing payment of the note and the sum of \$500 in cash; that the note, trust deed and cash were assets of the estate; that they failed and refused, after demand, to deliver to him the note, trust deed or cash; and he prayed for a citation. The citation was issued and served on defendants. In a verified answer respondents denied that they had any assets belonging to the estate and alleged that the items described in the citation as being assets of the estate, "passed to Sarah Weinberg as a gift inter vivos." A trial in the Probate Court resulted in a judgment that the citation be dismissed and respondents discharged. In a trial

In the Matter of the Estate of
GUS L. TEICHMAN, formerly known
as GUS L. TEICHMAN, deceased,

vs.
SARAH WEINBERG and MORRIS WEINBERG,
Petitioner in Distribution Proceedings,

Appellants,

v.

Respondents - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY,

3231A.125

JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Gus L. Teichman, also known as Gus L. Teichman, died at

Chicago on June 6, 1944. Letters testamentary were issued out
of the Probate Court of Cook County on July 28, 1944 to Benjamin

Teichman, an executor of his last will and testament. The
executor filed a verified petition charging that Morris Weinberg

and Sarah Weinberg "have in their or his or her possession or
control" a note executed by Fred H. Lee and Cordelia Lee dated

April 1, 1941, to the order of bearer in the principal sum of
\$4,000, bearing interest at six percent per annum, a trust deed

securing payment of the note and the sum of \$500 in cash; that

the note, trust deed and cash were assets of the estate; that

they failed and refused, after demand, to deliver to him the note,

trust deed or cash; and he prayed for a citation. The citation

was issued and served on defendants. In a verified answer respondents

denied that they had any assets belonging to the estate and

alleged that the items described in the citation as being assets

of the estate, "passed to Sarah Weinberg as a gift inter vivos."

A trial in the Probate Court resulted in a judgment that the

citation be dismissed and respondents discharged. In a trial

de novo in the Circuit Court following an appeal, the court found that the note of April 1, 1941 in the principal sum of \$6,000, bearing interest at six percent per annum and the trust deed securing payment, were not assets of the estate; that the trust deed and note were acquired by Sarah Weinberg as a gift inter vivos from Gussie Teichman in her lifetime, and ordered that the petition of the executor be dismissed and respondents discharged. The executor appeals.

Gussie Teichman conducted a rooming house at 5045 South Michigan Avenue, Chicago. She was a cripple, confined to a wheel chair, and had been in that condition for several years. Fred B. Lee and Cordelia Lee owned the real estate at 4923 South Michigan Avenue. On April 1, 1941 the Lees executed a principal note for \$6,000, payable to bearer five years after date, with interest at six percent per annum, payable semiannually on April 1 and October 1. They executed ten interest coupons. The transaction involving the making of this loan took place at the office of the attorneys who now represent respondents. In April, 1942 the Lees made a prepayment on the loan of \$500, in September, 1942 a second prepayment in the same amount and in April, 1943 a third prepayment in the same amount, reducing the principal note to \$4,500 and reducing the semiannual interest payment on each coupon to \$135. These prepayments were made to the attorneys who now represent respondents and who, in receiving the prepayments, did so as attorneys for Gussie Teichman. By the testimony of two witnesses who were employees of the First National Bank of Chicago, the executor established that the interest coupons payable on April 1, 1943, October 1, 1943 and April 1, 1944 were collected for the decedent by the First National Bank of Chicago prior to

de novo in the Circuit Court following an appeal, the court found that the note of April 1, 1941 in the principal sum of \$,000, bearing interest at six percent per annum and the trust deed securing payment, were not assets of the estate; that the trust deed and note were acquired by Sarah Weinberg as a gift inter vivos from Gussie Teichman in her lifetime, and ordered that the petition of the executor be dismissed and respondents discharged. The executor appeals.

Gussie Teichman conducted a rooming house at 5045 South Michigan Avenue, Chicago. She was a cripple, confined to a wheel chair, and had been in that condition for several years. Fred B. Lee and Cordelia Lee owned the real estate at 4923 South Michigan Avenue. On April 1, 1941 the Lees executed a principal note for \$,000, payable to bearer five years after date, with interest at six percent per annum, payable semiannually on April 1 and October 1. They executed ten interest coupons. The transaction involving the making of this loan took place at the office of the attorneys who now represent respondents. In April, 1942 the Lees made a prepayment on the loan of \$00, in September, 1942 a second prepayment in the same amount and in April, 1943 a third prepayment in the same amount, reducing the principal note to \$,500 and reducing the semiannual interest payment on each coupon to 1%. These prepayments were made to the attorneys who now represent respondents and who, in receiving the prepayments, did so as attorneys for Gussie Teichman. By the testimony of two witnesses who were employees of the First National Bank of Chicago, the executor established that the interest coupons payable on April 1, 1942, October 1, 1942 and April 1, 1944 were collected for the decedent by the First National Bank of Chicago prior to

their respective due dates and that the proceeds were deposited in her savings account in that bank. The court received in evidence exhibits showing the collection of \$135 by the bank on September 29, 1943 and the deposit of that sum, less 25 cents for a service charge, to her credit in her account on the same date, and also exhibits showing the collection by the bank on March 27, 1944 of an interest coupon note in the sum of \$135 and the deposit on that date to her credit of that sum, less a service charge of 25 cents. The court refused to admit into evidence exhibits showing the collection by the bank of \$150 representing the payment of an interest coupon on April 22, 1943 and the deposit to her credit of that sum, less a service charge of 25 cents, on the same date. The court also refused to admit as an exhibit the savings account book of decedent showing her account with the bank. There is no contention that the transactions evidenced by the proffered exhibits are not truly and correctly recorded therein. We are of the opinion that the proffered exhibits should have been received.

The exhibits show that the interest coupons were delivered to the bank for collection for the decedent and that when collected, the amounts were deposited in her savings account, deposit slips being made out. Sarah Weinberg, a respondent, was identified by the teller of the bank as being the person who brought to the bank interest coupons falling due on October 1, 1943 and April 1, 1944, and that she instructed the bank to credit the proceeds to the account of decedent. The deposit book shows that on March 9, 1938 decedent deposited \$1,000 and that on July 28, 1944, when the account was closed following her death, there was a balance of \$4,362.61. This book shows a deposit on April 2, 1942 of \$500 and on October 8, 1942 of \$500. In all probability these deposits represent two of the prepayments made by the Lees. The \$500 paid by the Lees on April 1, 1943 was not deposited in this account.

their respective due dates and that the proceeds were deposited in her savings account in that bank. The court received in evidence exhibits showing the collection of 125 by the bank on September 28, 1943 and the deposit of that sum, less 25 cents for a service charge, to her credit in her account on the same date, and also exhibits showing the collection by the bank on March 27, 1944 of an interest coupon note in the sum of 125 and the deposit on that date to her credit of that sum, less a service charge of 25 cents. The court refused to admit into evidence exhibits showing the collection by the bank of \$150 representing the payment of an interest coupon on April 28, 1944 and the deposit to her credit of that sum, less a service charge of 25 cents, on the same date. The court also refused to admit as an exhibit the savings account book of decedent showing her account with the bank. There is no contention that the transactions evidenced by the proffered exhibits are not truly and correctly recorded therein. We are of the opinion that the proffered exhibits should have been received. The exhibits show that the interest coupons were delivered to the bank for collection for the decedent and that when collected, the amounts were deposited in her savings account, deposit slips being made out. Sarah Weinberg, a respondent, was identified by the teller of the bank as being the person who brought to the bank interest coupons falling due on October 1, 1943 and April 1, 1944, and that she instructed the bank to credit the proceeds to the account of decedent. The deposit book shows that on March 9, 1938 decedent deposited 1,000 and that on July 28, 1944, when the account was closed following her death, there was a balance of 4,362.61. This book shows a deposit on April 2, 1942 of 500 and on October 8, 1942 of 500. In all probability these deposits represent two of the payments made by the Lees. The \$500 paid by the Lees on April 1, 1943 was not deposited in this account.

Ida Dashevsky, called by respondents, testified that she lived at 1434 South Kedzie Avenue, Chicago, and that decedent was her aunt. In answer to a question as to whether she had a conversation with decedent with respect to a mortgage on the real estate at 4923 South Michigan Avenue, she answered in the affirmative, and that the conversation took place at the home of her aunt, Mrs. Teichman, in the presence of witness's aunt, witness's mother and witness; and that her aunt "told my mother and I that she had given her sister some papers, mortgage papers, on the other house as a gift." On being requested by the court to repeat the "exact words" used, witness answered: "Well, she said she gave her sister a gift of the mortgage papers on her other house that she had." She testified further that by the words "her sister" she had reference to Sarah Weinberg and that decedent had only the one sister. Asked as to whether she had any conversation with respect to any other gifts, witness answered: "Yes, sir. I had such a conversation some time about a year and a half ago, I think." She stated that she could not fix a more definite date for the conversation that that it occurred a year and a half previously; that witness's mother and witness's aunt, in addition to witness, were present at this conversation which took place at her aunt's home; and that in this conversation her aunt said "she gave her sister \$500 to help buy a home."

Dora Teichman, called by respondents, testified that she lived at 1434 South Kedzie Avenue, Chicago; that she was a sister-in-law of decedent and the mother of Ida Dashevsky; and that she visited decedent every week. Asked as to whether she had a conversation with decedent with respect to a mortgage on the real estate at 4923 South Michigan Avenue, she answered in the affirmative. She testified further that the conversation occurred about the end of March or the first

Ida Deshevsky, called by respondents, testified that she lived at 1434 South Kedzie Avenue, Chicago, and that Decedent was her aunt. In answer to a question as to whether she had a conversation with Decedent with respect to a mortgage on the real estate at 4923 South Michigan Avenue, she answered in the affirmative, and that the conversation took place at the home of her aunt, Mrs. Teichman, in the presence of witness's aunt, witness's mother and witness; and that her aunt "told my mother and I that she had given her sister some papers, mortgage papers, on the other house as a gift." On being requested by the court to repeat the "exact words" used, witness answered: "Well, she said she gave her sister a gift of the mortgage papers on the other house that she had." She testified further that by the words "her sister" she had reference to Sarah Weinberg and that Decedent had only the one sister. Asked as to whether she had any conversation with respect to any other gifts, witness answered: "Yes, sir, I had such a conversation some time about a year and a half ago, I think." She stated that she could not fix a more definite date for the conversation than that it occurred a year and a half previously; that witness's mother and witness's aunt, in addition to witness, were present at this conversation which took place at her aunt's home; and that in this conversation her aunt said "she gave her sister \$500 to help buy a home."

Bora Teichman, called by respondents, testified that she lived at 1434 South Kedzie Avenue, Chicago; that she was a sister-in-law of Decedent and the mother of Ida Deshevsky; and that she visited Decedent every week. Asked as to whether she had a conversation with Decedent with respect to a mortgage on the real estate at 4923 South Michigan Avenue, she answered in the affirmative. She testified further that the conversation occurred about the end of March or the first

part of February, 1944. She also stated that the conversation occurred "a year and a half ago" and that it took place at decedent's home in the presence of her daughter Ida, decedent and witness. Answering a question as to what was said in the conversation, witness replied: "She said she gave her sister, Sarah, the papers on the house for a gift and she gave it to her to have it." Objections by the attorney for the executor to the testimony of these witnesses and motions to strike the answers on the ground that witnesses were giving their conclusions rather than the conversation, were overruled.

There was testimony that decedent died in a hospital at about 4:30 p.m. on June 6, 1944. Morris Weinberg, one of the respondents, testified that he lived at 4609 North Harding Avenue, Chicago; that on the night of the afternoon when decedent died, he, with Mrs. Sarah Weinberg, the other respondent, their son Sidney Weinberg and Benjamin Teichman, who was later appointed executor, went to the late home of decedent at 5045 South Michigan Avenue; that "we collected all the valuable papers there;" that Mr. Teichman "looked at it and we put it in a shopping bag. We put all the papers in a shopping bag, what I thought was valuable papers, and those that we were supposed to examine;" that Mr. Teichman and witness examined the papers and that after putting them in a shopping bag "we were supposed to go to his daughter and my daughter-in-law;" that Mrs. Ouida Smith, the housekeeper, was present and gave them the shopping bag; that they went to an elevated station and started to go to his daughter's home to examine the papers. From other testimony it appears that Mr. Teichman did not go to the home of Mr. Weinberg's daughter that night. Witness testified further that

part of February, 1944. He also stated that the conversation

occurred "a year and a half ago" and that it took place at

decendant's home in the presence of her daughter Ida, decendant and

witness. Answering a question as to what was said in the conver-

sation, witness replied: "She said she gave her sister, Sarah,

the papers on the house for a gift and he gave it to her to have

it." Objections by the attorney for the executor to the testimony

of these witnesses and motions to strike the answers on the ground

that witnesses were giving their conclusions rather than the

conversation, were overruled.

There was testimony that decendant died in a hospital at

about 4:30 p.m. on June 8, 1944. Morris Weinberg, one of the

respondents, testified that he lived at 4809 North Harding Avenue,

Chicago; that on the night of the afternoon when decendant died, he

with Mrs. Sarah Weinberg, the other respondent, their son Sidney

Weinberg and Benjamin Teichman, who was later appointed executor,

went to the late home of decendant at 8045 South Michigan Avenue;

that "we collected all the valuable papers there;" that Mr. Teichman

"looked at it and we put it in a shopping bag. We put all the

papers in a shopping bag, what I thought was valuable papers, and

those that we were supposed to examine;" that Mr. Teichman and

witness examined the papers and that after putting them in a shopping

bag "we were supposed to go to his daughter and my daughter-in-law;"

that Mrs. Julia Smith, the housekeeper, was present and gave them

the shopping bag; that they went to an elevated station and started

to go to his daughter's home to examine the papers. From other

testimony it appears that Mr. Teichman did not go to the home of

Mr. Weinberg's daughter that night. Witness testified further that

"the mortgage on the 4923-25 Michigan Avenue property was not among the papers that we put in the shopping bag;" that he had a further conversation with Mr. Teichman when they were leaving the cemetery; that in that conversation Mr. Teichman asked witness if he had the keys to the safety deposit vault where decedent "kept her stuff," and that witness answered in the negative; that witness also said that the key was over on Michigan Avenue; that Mr. Teichman asked witness to get the key to the box; and that witness went to decedent's former home a few days later and in the presence of Mr. and Mrs. Smith, found the key. Witness testified that the next conversation with Mr. Teichman was the following day at witness's home, when Mr. Teichman came to "look at the papers;" that in the presence of witness and witness's wife Mr. Teichman asked him where the \$6,000 mortgage was; that witness told him to "forget it because we had the mortgage a long while in our possession;" that decedent "gave it to us and that we can prove that the mortgage is in a safe keeping." He testified further that he did not tell Mr. Teichman that it was in a safety deposit box; that he and his wife had a safety deposit box at the Albany Park Bank and that the first time he visited the box after the death of decedent was on November 1, 1944; that at that time he opened the box in the presence of two employees of the vault company and took out the mortgage; and that "the mortgage and all the papers, notes were in there."

Rose Kaufman, called by respondents, testified that she was vault custodian at the Albany Park Safety Deposit Vault; that when a customer comes to the counter he signs an entry slip; that she checks the signature against the signature card; that she then lets the customer into the vault and opens the box, which she hands to the customer; that from the entry slips she enters

"the mortgage on the 4823-25 Michigan Avenue property was not among the papers that we put in the shoeing bag;" that he had a further conversation with Mr. Teichman when they were leaving the cemetery; that in that conversation Mr. Teichman asked witness if he had the keys to the safety deposit vault where deceased "kept her stuff," and that witness answered in the negative; that witness also said that the key was over on Michigan Avenue; that Mr. Teichman asked witness to get the key to the box; and that witness went to deceased's former home a few days later and in the presence of Mr. and Mrs. Smith, found the key. Witness testified that the next conversation with Mr. Teichman was the following day at witness's home, when Mr. Teichman came to "look at the papers;" that in the presence of witness and witness's wife Mr. Teichman asked him where the \$6,000 mortgage was; that witness told him to "forget it because we had the mortgage a long while in our possession;" that deceased "gave it to me and that we can prove that the mortgage is in a safe keeping." He testified further that he did not tell Mr. Teichman that it was in a safety deposit box; that he and his wife had a safety deposit box at the Albany Park Bank and that the first time he visited the box after the death of deceased was on November 1, 1944; that at that time he opened the box in the presence of two employees of the vault company and took out the mortgage; and that "the mortgage and all the papers, notes were in there."

Joe Kaufman, called by respondents, testified that she was vault custodian at the Albany Park Safety Deposit Vault; that when a customer comes to the counter he signs an entry slip; that she checks the signature against the signature card; that she then lets the customer into the vault and opens the box, which she hands to the customer; that from the entry slips she enters

the date the customer was in the vault; and that Mr. and Mrs. Weinberg have a safety deposit box there. Witness identified a card showing entries to the box by Sarah Weinberg and Morris Weinberg. The card shows entries by Sarah Weinberg on April 20, 1944, May 2, 1944, May 15, 1944, November 6, 1944, two entries on November 9, 1944, and other subsequent entries by Morris Weinberg on May 19, 1944, May 26, 1944, November 1, 1944, November 10, 1944 and other subsequent dates. Witness stated that there are approximately 1,000 entries to the vault in a month; that either she or one of the other girls makes all of the recordations on the card and that the card is made up in the ordinary course of business under her supervision. In answer to a question as to whether it is possible that some entries may have been made and not have been recorded on the card, she answered in the affirmative. She further testified that according to the card the first entry to the box after June 6, 1944 was on November 1, 1944; that Marshall Sampson and she were present when the latter entry was made; that Mr. Weinberg asked them to take his box and look into it and that they refused; that they opened the lock on the door and handed the box to him; that he refused to take it; that she took it to the counter where Mr. Sampson and she could look; that Mr. Weinberg took out "a trust deed and a number of notes;" and that they checked the number on the trust deed with the contents of an affidavit which Mr. Weinberg had. On examining the affidavit to refresh her memory, she gave the Recorder's number on the trust deed. She also testified that she believed there were "four notes and a mortgage" and the trust deed; that there were four interest coupons and that the trust deed was separate from the principal note and the interest coupons.

The date the customer was in the vault; and that Mr. and Mrs. Weinberg have a safety deposit box there. Witness identified a card showing entries to the box by Sarah Weinberg and Morris Weinberg. The card shows entries by Sarah Weinberg on April 20, 1944, May 2, 1944, May 12, 1944, November 6, 1944, two entries on November 9, 1944, and other subsequent entries by Morris Weinberg on May 19, 1944, May 26, 1944, November 1, 1944, November 10, 1944 and other subsequent dates. Witness stated that there are approximately 1,000 entries to the vault in a month; that either she or one of the other girls makes all of the reservations on the card and that the card is made up in the ordinary course of business under her supervision. In answer to a question as to whether it is possible that some entries may have been made and not have been recorded on the card, she answered in the affirmative. She further testified that according to the card the first entry to the box after June 8, 1944 was on November 1, 1944; that Marshall Sampson and she were present when the latter entry was made; that Mr. Weinberg asked them to take his box and lock into it and that they refused; that they opened the lock on the door and handed the box to him; that he refused to take it; that she took it to the counter where Mr. Sampson and she could look; that Mr. Weinberg took out "a trust deed and a number of notes;" and that they checked the number on the trust deed with the contents of an affidavit which Mr. Weinberg had. On examining the affidavit to refresh her memory, she gave the Recorder's number on the trust deed. She also testified that she believed there were "four notes and a mortgage" and the trust deed; that there were four interest coupons and that the trust deed was separate from the principal note and the interest coupons.

Sarah Weinberg, called by respondents, testified that she is a sister of decedent; that about 10:30 p.m. on the day her sister died, witness and her husband, their son and Mr. Teichman went to decedent's former home; that she informed Mrs. Smith, the housekeeper, that decedent had passed away and that she wanted to "collect some papers there that would come in handy;" that Mrs. Smith gave her a shopping bag; that she put "everything" in the shopping bag and went home; that the "mortgage on the property at 4923 South Michigan Avenue" was not in the shopping bag; that the first time she went to their safety deposit box after the death of her sister was on November 1, 1944; that in the presence of Mr. Sampson and Mrs. Kaufman they examined the contents; that "the note and mortgage were in the box;" and that at that time she took "one of the notes out for collection."

Ouida Smith testified that she was the housekeeper for decedent and that the house consisted of 13 apartments. Asked as to whether she had any conversation with decedent with reference to a gift of money to Mrs. Weinberg, she answered in the affirmative, and that the conversation was around March 15, 1944. Asked as to what decedent said with respect to "this money gift", she answered: "She said she was going to give it to her for a gift, she is giving it to her, making a gift of that \$500." Mrs. Smith, called as a witness by the executor, testified that decedent was an invalid; that the last time decedent left her home was "around about '43;" that Mrs. Weinberg came over once or twice a week. Asked as to whether she had discussed with decedent the matter of a mortgage "on Michigan Avenue", she answered in the affirmative, and that the conversation was in January, 1944, when decedent took sick; that decedent "told me that she was going to tell me about her will and she said the mortgage would - her mortgage was going back to her

Baran Weinberg, called by respondents, testified that she is a sister of decedent; that about 10:30 p.m. on the day her sister died, witness and her husband, their son and Mr. Teichman went to decedent's former home; that she informed Mrs. Smith, the housekeeper, that decedent had passed away and that she wanted to "collect some papers that she would come in handy;" that Mrs. Smith gave her a shopping bag; that she put "everything" in the shopping bag and went home; that the "mortgage on the property at 4925 South Michigan Avenue" was not in the shopping bag; that the first time she went to their safety deposit box after the death of her sister was on November 1, 1944; that in the presence of Mr. Sampson and Mrs. Kaufman they examined the contents; that "the note and mortgage were in the box;" and that at that time she took "one of the notes out for collection."

Outida Smith testified that she was the housekeeper for decedent and that the house consisted of 13 apartments. Asked as to whether she had any conversation with decedent with reference to a gift of money to Mrs. Weinberg, she answered in the affirmative, and that the conversation was around March 15, 1944. Asked as to what decedent said with respect to "this money gift", she answered: "She said she was going to give it to her for a gift, she is giving it to her, making a gift of that \$500." Mrs. Smith, called as a witness by the executor, testified that decedent was an invalid; that the last time decedent left her home was "around about 1942;" that Mrs. Weinberg came over once or twice a week. Asked as to whether she had discussed with decedent the matter of a mortgage "on Michigan Avenue", she answered in the affirmative, and that the conversation was in January, 1944, when decedent took stock; that decedent "told me that she was going to tell me about her will and she said the mortgage would - her mortgage was going back to her

estate, be added to her estate and be divided according to her will." Witness stated that the income from the operation of the rooming house was \$200 a month and that after paying expenses, \$100 was left; that on the night of June 6, 1944, after the death of decedent, Mr. and Mrs. Weinberg, their son Sidney and Mr. Teichman came to the house; that Mrs. Weinberg told her to come with them to decedent's apartment "to see what we are taking out of this place;" that she went with them; that "the place was ransacked and everything was looked through;" that "they turned the covers up and they found \$26 in money on the table under the tablecloth and they took some papers from the drawers and from the cedar chest;" that Mr. Teichman did not take anything; that Mr. and Mrs. Weinberg and their son were "looking for things;" and that she put the papers in her purse. Benjamin Teichman testified that he was a nephew of decedent; that on June 6, 1944, Mr. and Mrs. Weinberg, their son Sidney and witness went to the former home of decedent; that they went through several papers, some of which they threw aside and some of which Mrs. Weinberg put in her purse; that Mr. Weinberg's son gathered other papers together, which were put in a shopping bag; that Mrs. Weinberg did not hand him any papers; that he was standing in the middle of the room and that he did not see the papers that were taken.

The burden was on respondents to prove by clear and convincing evidence the essential facts of a gift by delivery of the property by Gussie Teichman to the donee with intent to pass title. Keshner v. Keshner, 376 Ill. 354. In the latter case the court said (363):

"It is well known that courts lend a very unwilling ear to statements by interested persons about what dead men have said; that such evidence is subject to great abuse and that it will be carefully scrutinized as well as considered with all the other evidence in the case."

estate, be added to her estate and be divided according to her will." Witness stated that the income from the operation of the rooming house was \$200 a month and that after paying expenses, \$100 was left; that on the night of June 6, 1944, after the death

of decedent, Mr. and Mrs. Weinberg, their son Sidney and Mr. Teichman came to the house; that Mrs. Weinberg told her to come with them to decedent's apartment "to see what we are taking out

of this place;" that she went with them; that "the place was ransacked and everything was looked through;" that "they turned the covers up and they found \$25 in money on the table under the tablecloth and they took some papers from the drawers and from the cedar chest;" that Mr. Teichman did not take anything; that Mr. and Mrs. Weinberg and their son were "looking for things;"

and that she put the papers in her purse. Benjamin Teichman testified that he was a nephew of decedent; that on June 8, 1944, Mr. and Mrs.

Weinberg, their son Sidney and witness went to the former home of decedent; that they went through several papers, some of which they threw aside and some of which Mrs. Weinberg put in her purse; that Mr. Weinberg's son gathered other papers together, which were put in a shopping bag; that Mrs. Weinberg did not hand him any

papers; that he was standing in the middle of the room and that he did not see the papers that were taken.

The burden was on respondents to prove by clear and convincing evidence the essential facts of a gift by delivery of the property by Gertrude Teichman to the donee with intent to pass title. Kashner v. Kashner, 378 Ill. 384. In the latter case the

court said (352):

"It is well known that courts lend a very unwilling ear to statements by interested persons about what dead men have said; that such evidence is subject to great abuse and that it will be carefully scrutinized as well as considered with all the other evidence in the case."

Appellant maintains that the testimony of Ida Dashevsky and Dora Teichman relative to an alleged conversation with decedent amounted to mere conclusions and was improperly received in evidence. We are of the opinion that it was not error to receive this testimony. However, the evidence to prove delivery or intent to make a gift falls far short of that clear and convincing proof which the law requires. There was a confidential relationship between decedent and respondent Sarah Weinberg. In Warren v. Pfeil, 346 Ill. 344, our Supreme Court said (360):

"A fiduciary relationship is not limited to cases of trustee and cestui que trust, guardian and ward, attorney and client, and other recognized legal relationships, but extends to every possible case in which there is confidence reposed on one side and a resulting superiority and domination on the other. The origin of the confidence may be moral, social, domestic or merely personal. If the confidence in fact exists and is reposed by one party and accepted by the other the relation is fiduciary and equity will regard dealings between the parties according to the rules which apply to such relation."

Sarah Weinberg and decedent were sisters. Decedent was a cripple and confined to a wheel chair. Mrs. Weinberg acted as a messenger in collecting interest represented by the coupon notes and in depositing such interest to the credit of decedent. Ida Dashevsky testified about two conversations and about two gifts. She said one conversation occurred the latter part of March or the beginning of April, 1944 and related to an alleged gift "of the mortgage papers." The other conversation took place about a year and a half before the trial. The date of the trial was January 5, 1945, which would fix this conversation as occurring during July, 1943. In this last conversation decedent is represented as having said she gave her sister \$500 "to help buy a home". Mrs. Smith testified about a conversation with decedent around March 15, 1944 wherein she quoted decedent as saying she was going to give Mrs. Weinberg a gift of \$500, and also that "she made her a gift of \$500." Mrs. Dashevsky

Appellant maintains that the testimony of Ida Dabavsky and Sarah Weinberg relative to an alleged conversation with decedent amounted to mere conjectures and was improperly received in evidence. We are of the opinion that it was not error to receive this testimony. However, the evidence to prove delivery or intent to make a gift falls far short of that clear and convincing proof which the law requires. There is a confidential relationship between decedent and respondent Sarah Weinberg. In Spren v. Weil, 343 Ill. 344, our Supreme Court said (350):

"A fiduciary relationship is not limited to cases of trustee and cestui que trust, guardian and ward, attorney and client, and other recognized legal relationships, but extends to every possible case in which there is confidence reposed on one side and a resulting expectancy and domination on the other. The origin of the confidence may be moral, social, domestic or merely personal. If the confidence in fact exists and is reposed by one party and accepted by the other the relation is fiduciary and equity will regard dealings between the parties according to the rules which apply to such relation."

Sarah Weinberg and decedent were sisters. Decedent was a cripple and confined to a wheel chair. Mrs. Weinberg acted as a messenger in collecting interest represented by the coupon notes and in depositing such interest to the credit of decedent. Ida Dabavsky testified about two conversations and about two gifts. She said one conversation occurred the latter part of March or the beginning of April, 1944 and related to an alleged gift "of the mortgage papers." The other conversation took place about a year and a half before the trial. The date of the trial was January 5, 1945, which would fix this conversation as occurring during July, 1943. In this last conversation decedent is represented as having said she gave her sister \$500 "to help buy a home". Mrs. Smith testified about a conversation with decedent around March 10, 1944 wherein she quoted decedent as saying she was going to give Mrs. Weinberg a gift of \$500, and also that "she made her a gift of \$500".

testified that at the time of the conversation relating to the \$500, her mother, Mrs. Dora Teichman, was present, but the latter was not asked nor did she testify concerning the \$500. Although in the petition and answer filed in the Probate Court there was an issue joined as to the \$500, when the case was decided in the Circuit Court there was no finding as to the \$500. It is also interesting to note that in the order entered in the Circuit Court there was no finding or disposition as to the ownership of the interest coupons.

It appears that decedent also had a safety deposit box and that after her death Mr. Teichman asked respondents for the keys to this box. The latter found the keys at the former residence of decedent. Admittedly, the trust deed, principal note and interest coupons involved were not in decedent's safety deposit box, or there would be no controversy. The evidence shows that the trust deed, principal note and four interest coupons were in the safety deposit box belonging to respondents at the time it was opened in the presence of employees of the vault company on November 1, 1944. It is also shown that this box was not entered between May 26, 1944 and November 1, 1944. In our opinion the evidence shows that at the time of the death of Gussie Teichman, the trust deed, principal note and interest coupons were in respondents safety deposit box. It is interesting to note that interest coupons Nos. 7, 8, 9 and 10, with due dates of October 1, 1944, April 1, 1945, October 1, 1945 and April 1, 1946, were also in respondents' box. The interest coupons collected and credited to decedent's savings account on March 26, 1943, September 29, 1943 and March 27, 1944 were delivered to the bank by respondent Sarah Weinberg. It appears to be conceded that all of the interest coupons were the property of decedent at the time of her death. The contention of respondents appears to

testified that at the time of the conversation relating to the 500, her father, Mr. John Teichman, was present, but the latter was not asked how his father testified concerning the 500. Although in the question and answer filed in the Probate Court there was an issue joined as to the 500, when the case was decided in the Circuit Court there was no finding as to the 500. It is also interesting to note that in the order entered in the Circuit Court there was no finding or disposition as to the ownership of the interest coupons.

It appears that decedent also had a safety deposit box and that after her death Mr. Teichman saved respondents for the keys to this box. The father found the keys at the former residence of decedent. Admittedly, the trust deed, principal note and interest coupons involved were not in decedent's safety deposit box, or there would be no controversy. The evidence shows that the trust deed, principal note and four interest coupons were in the safety deposit box belonging to respondents at the time it was opened in the presence of employees of the vault company on November 1, 1944. It is also shown that this box was not entered between May 26, 1944 and November 1, 1944. In our opinion the evidence shows that at the time of the death of Gussie Teichman, the trust deed, principal note and interest coupons were in respondents' safety deposit box. It is interesting to note that interest coupons Nos. 7, 8, 9 and 10, with due date of October 1, 1944, April 1, 1945, October 1, 1945 and April 1, 1946, were also in respondents' box. The interest coupons collected and credited to decedent's savings account on March 26, 1943, September 29, 1943 and March 27, 1944 were delivered to the bank by respondent Sarah Teichman. It appears to be conceded that all of the interest coupons were the property of decedent at the time of her death. The contention of respondents appears to

be that the trust deed and principal note were delivered to them or to Sarah Weinberg as a gift, and that title to the interest coupons remained in decedent. However, when respondents' box was opened on November 1, 1944 it contained the unpaid interest coupons, trust deed and principal note. This strengthens the position of petitioner that Sarah Weinberg was at all times acting in a fiduciary capacity. Apparently, when an interest coupon became due, Mrs. Weinberg took such coupon from the safety deposit box and delivered it to the bank for collection to be credited to decedent's account. It is clear that in so doing she was acting as a messenger or agent of her sister, Gussie Teichman.

We find that the evidence shows that Sarah Weinberg acted as a fiduciary of the decedent; that she was in possession of the principal note, interest coupons and trust deed as such fiduciary at the time her sister died; that the burden was on her to show that her possession of the papers as a fiduciary became that of possession as an owner; and that she failed to make this proof. As petitioner points out, there are at least three versions of the story as to whom the trust deed and principal note belonged. Sarah Weinberg claims them to be hers by her answer; Morris Weinberg claims decedent "gave it to us," meaning respondents; and Mrs. Smith, the housekeeper, testified that decedent said "it was to be added to her estate" and "divided according to the will." Fred B. Lee, the owner of the real estate secured by the trust deed, testified that he always made his interest payments at the First National Bank and that he never received any notice from anyone that he should pay at any other place. If Sarah Weinberg was the owner of the paper in January, February or March, 1944, it is strange that she did nothing toward notifying Mr. Lee of the change of ownership and that she deposited the interest note maturing April 1, 1944 with the First National Bank for collection

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fiduciary capacity. Apparently, when an interest coupon became due, Mrs. Weinberg took such coupon from the safety deposit box and delivered it to the bank for collection to be credited to decedent's account. It is clear that in so doing she was acting as a messenger or agent of her sister, Gusale Teichman.

We find that the evidence shows that Sarah Weinberg acted as a fiduciary of the decedent; that she was in possession of the principal note, interest coupons and trust deed as such fiduciary at the time her sister died; that the burden was on her to show that her possession of the papers as a fiduciary became that of possession as an owner; and that she failed to make this proof. As petitioner points out, there are at least three versions of the story as to whom the trust deed and principal note belonged.

Sarah Weinberg claims them to be hers by her answer; Morris Weinberg claims decedent "gave it to me," meaning respondents; and Mrs. Smith, the housekeeper, testified that decedent said "it was to be added to her estate" and "divided according to the will."

Fred B. Lee, the owner of the real estate secured by the trust deed, testified that he always made his interest payments at the First National Bank and that he never received any notice from anyone that he should pay at any other place. If Sarah Weinberg was the owner of the paper in January, February or March, 1944, it is strange that she did nothing toward notifying Mr. Lee of the change of ownership and that she deposited the interest note maturing April 1, 1944 with the First National Bank for collection

for the account of her sister. There is no proof as to when the alleged gift was consummated, nor were there any eyewitnesses to the consummation of the alleged gift, or that the property was ever claimed by Sarah Weinberg to be hers in the presence of her sister. There is no proof as to when the alleged gift was made. Gussie Teichman's only income was about \$100 per month from the operation of the rooming house and the income on the mortgage in dispute. In the case of In re Estate of Huston, 319 Ill. App. 361, where a nephew claimed to have received \$2,200 of his uncle's money as a gift inter vivos and the money was in the nephew's possession before the death of his uncle, the court said (365):

"It is unthinkable that a man with one leg, unable to earn his living, would strip himself of every penny he had on earth and hand out twenty two hundred dollars to a nephew without any contract or agreement for care and keep the rest of his life, and no provision for sickness, last illness, funeral expenses, care and support of a four year old daughter, and give it all to a nephew. * * * The facts and circumstances in evidence show that the donee occupied a confidential relationship with the donor."

The facts and circumstances of the case at bar make it improbable that Gussie Teichman, a cripple confined to a wheel chair, with only a small income from a rooming house and the income from the mortgage, would make a gift of the mortgage having a value of \$4,500.

For the reasons stated, the judgment of the Circuit Court of Cook County is reversed and the cause remanded with directions to enter a judgment finding that the trust deed, principal note and interest coupons were the property of Gussie Teichman at the time of her death; that they are now the property of Benjamin Teichman, as executor of the estate of Gussie Teichman, deceased; and directing that Sarah Weinberg and Morris Weinberg, and each of them forthwith deliver the trust deed, principal note, interest coupons and interest, if any collected, to Benjamin Teichman, as executor.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY, P.J. AND LEWE, J. CONCUR.

for the account of her sister. There is no proof as to when the alleged gift was consummated, nor were there any eyewitnesses to the consummation of the alleged gift, or that the property was ever claimed by Sarah Weinberg to be hers in the presence of her sister. There is no proof as to when the alleged gift was made. Gustaf Teichman's only income was about \$100 per month from the operation of the rooming house and the income on the mortgage in dispute. In the case of In re Estate of Gustaf Teichman, 351, where a nephew claimed to have received \$2,500 of his uncle's money as a gift inter vivos and the money was in the nephew's possession before the death of his uncle, the court said (352):

"It is unthinkable that a man with one leg, unable to earn his living, would strip himself of every penny he had on earth and hand out twenty two hundred dollars to a nephew without any contract or agreement for care and keep the rest of his life, and no provision for sickness, last illness, funeral expenses, care and support of a ten year old daughter, and give it all to a nephew. * * * The facts and circumstances in evidence show that the donee conceived a confidential relationship with the donor."

The facts and circumstances of the case at bar make it improbable that Gustaf Teichman, a cripple confined to a wheel chair, with only a small income from a rooming house and the income from the mortgage, would make a gift of the mortgage having a value of \$4,500.

For the reasons stated, the judgment of the Circuit Court of Cook County is reversed and the cause remanded with directions to enter a judgment finding that the trust deed, principal note and interest coupons were the property of Gustaf Teichman at the time of her death; that they are now the property of Sarah Weinberg, as executor of the estate of Gustaf Teichman, deceased; and

directing that Sarah Weinberg and Morris Weinberg, and each of them forthwith deliver the trust deed, principal note, interest coupons and interest, if any collected, to Benjamin Teichman, as executor.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILLY, P. J. AND LEWIS, J. CONCUR.

43455

EMILY PILACKUS,

Appellant,

v.

PAUL PILACKUS, ANNA RITCHIE and
AGNES GEDRAITIS, Executors of the
Estate of PAUL PILACKUS, also
known as PAUL PLATZ, Deceased,
State Bank of Clearing, as
Intervening Petitioner,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

328 I.A. 126

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Emily Pilackus and Paul Pilackus were married at Chicago on September 11, 1912. Two children were born of the marriage, namely, Otto, born February 26, 1914, and Joseph, born December 19, 1916. On August 10, 1925 a decree was entered in the Superior Court of Cook County, on the bill of complaint filed by Emily Pilackus, the answer of Paul Pilackus, a stipulation and evidence. The decree dissolved the bonds of matrimony, gave her the care, custody and education of the children, and directed him to pay her \$10 a week for their support.

On October 4, 1944 plaintiff filed a verified petition setting out that she reared the children to maturity; that shortly after the entry of the decree defendant "made his presence unknown" to her and their children; that it was "only within a few days last past" that she learned of his whereabouts; that following the entry of the decree she received from him the aggregate sum of \$80 for the support and maintenance of the children; that because of defendant's failure to comply with the decree, she had to rely upon the charity of friends and relatives and of the man she married in 1927; that the amount due under the decree was \$5,610; that she "had been informed" that defendant maintained a

EMILY PILICKUS,

Defendant,

v.

PAUL PILICKUS, ANNA RYCHLIK and
AGNES GEMILLITZ, Executors of the
Estate of PAUL PILICKUS, also
known as PAUL PLAT, Decedent,
State Bank of Illinois, as
Intervening Petitioner,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

3281A.123

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Emily Pilickus and Paul Pilickus were married at Chicago on September 11, 1911. Two children were born of the marriage, namely, Otto, born February 26, 1914, and Joseph, born December 17, 1916. On August 10, 1923 a decree was entered in the Superior Court of Cook County, on the bill of complaint filed by Emily Pilickus, the answer of Paul Pilickus, a stipulation and verdict. The decree dissolved the bonds of matrimony, gave her the care, custody and education of the children, and directed him to pay her \$10 a week for their support.

On October 4, 1924 Plaintiff filed a verified petition setting out that she reared the children to maturity; that shortly after the entry of the decree defendant "made his presence unknown" to her and their children; that it was "only within a few days last past" that she learned of his whereabouts; that following the entry of the decree she received from him the aggregate sum of \$80 for the support and maintenance of the children; that because of defendant's failure to comply with the decree, she had to rely upon the charity of friends and relatives and of the man she married in 1927; that the amount due under the decree was \$5,811; that she had been informed that defendant maintained a

bank account in the State Bank of Clearing, Chicago, the amount to his credit therein being unknown to her; that the account is "carried under the alias of Paul Platz;" that she feared the removal of the account if notice be given of her application for relief; and she prayed for an order requiring the bank to tender an accounting of the funds, if any, in its possession to the credit of defendant and that the bank and its agents be restrained from making any disbursement of the funds credited to defendant until the further order of the court. On the same day a supplemental petition was filed by plaintiff containing substantially the same allegations, but adding a prayer that the clerk issue a writ of summons requiring the Sheriff to summon the bank to answer her petition. On October 4, 1944 the court, without notice to the defendant or the bank, entered an order restraining the bank from paying out any amounts to the credit of Paul Pilaekus or Paul Platz, and that it answer her petition in ten days. The record is silent as to how the bank was notified that a temporary injunction was granted. On October 7, 1944 an officer of the bank sent a letter by registered mail to the clerk of the Superior Court, and a copy to the attorney for plaintiff, stating that in answer to the "Chancery Order", it did not have an account in the name of Paul Pilaekus, otherwise known as Paul Platz, and that to the best of his knowledge the bank did not have any accounts containing funds belonging to defendant. On November 29, 1944 the same officer of the bank sent by registered mail to the clerk of the Superior Court and a copy to the attorney for plaintiff, a second letter, stating that upon further search of its records an account was found in the name of Paul Platz, showing a balance to his credit of \$2,014.63. On December 4, 1944 plaintiff filed a further petition, verified November 30, 1944, stating that on that date she was informed of

bank account in the State Bank of Clearing, Chicago, the amount to his credit therein being unknown to her; that the account is "carried under the alias of Paul Plater;" that she feared the removal of the account if notice be given of her application for relief; and she prayed for an order requiring the bank to tender an accounting of the funds, if any, in its possession to the credit of defendant and that the bank and its agents be restrained from making any disbursement of the funds credited to defendant until the further order of the court. On the same day a supplemental petition was filed by plaintiff containing substantially the same allegations, but adding a prayer that the clerk issue a writ of summons requiring the bank to summon the bank to answer her petition. On October 4, 1944 the court, without notice to the defendant or the bank, entered an order restraining the bank from paying out any amounts to the credit of Paul Plater or Paul Plater, and that it answer her petition in ten days. The record is silent as to how the bank was notified that a temporary injunction was granted. On October 7, 1944 an officer of the bank sent a letter by registered mail to the clerk of the Superior Court, and a copy to the attorney for plaintiff, stating that in answer to the "Chancery Order," it did not have an account in the name of Paul Plater, otherwise known as Paul Plater, and that to the best of his knowledge the bank did not have any account containing funds belonging to defendant. On November 29, 1944 the same officer of the bank sent by registered mail to the clerk of the Superior Court and a copy to the attorney for plaintiff, a second letter, stating that upon further search of its records an account was found in the name of Paul Plater, showing a balance to his credit of \$2,014.63. On December 4, 1944 plaintiff filed a further petition, verified November 30, 1944, stating that on that date she was informed of

the recent death of defendant and prayed for the entry of an order restraining the bank and its agents from paying out any funds to the credit of her former husband, then deceased. On December 4, 1944 the court entered an order reciting that it was informed that defendant died and ordered that the bank and its agents be restrained from paying out any amounts credited to Paul Platz, deceased, until the further order of the court.

On January 22, 1945 the court entered an order reciting that it appearing that the bank had not theretofore been served with a summons and "is not a party hereto", that a summons issue against the "duly appointed and qualified administrator or executor of the estate of Paul Pilackus," deceased, and also that a summons issue against the bank. Writs of summons were served on the bank and on Anna Ritchie and Agnes Gedraitis, Coexecutrices of the last will of Paul Pilackus, deceased. On March 8, 1945 the bank filed its appearance and a petition representing that at the time of the death of defendant it had on deposit to his credit the sum of \$2,014.63; that it had expended \$5 in filing its appearance and had incurred certain attorney's fees in the matter, and prayed that an order be entered authorizing and directing it to deposit the balance of the funds with the clerk of the court, or with such other party as the court might determine, to be held until the final order of the court determining who was entitled to the funds, and that it be dismissed from the case. On March 8, 1945 an order was entered that the petition of the bank stand as its answer to the petition of plaintiff, and that the coexecutrices be given leave to answer the petition within 20 days.

On March 19, 1945 the coexecutrices filed a special appearance for the "sole purpose of questioning the jurisdiction of the court." On March 19, 1945 they filed a motion to dismiss plaintiff's petition and to dissolve the restraining orders on the

the recent death of defendant and prayed for the entry of an order restraining the bank and its agents from paying out any funds to the credit of her former husband, then deceased. On December 4, 1944 the court entered an order reciting that it was informed that defendant died and ordered that the bank and its agents be restrained from paying out any amounts credited to Paul Plisk, deceased, until the further order of the court.

On January 22, 1945 the court entered an order reciting that it appeared that the bank had not theretofore been served with a summons and "is not a party hereto", that a summons issue against the " duly appointed and qualified administrator or executor of the estate of Paul Plisk, deceased, and also that a summons issue against the bank. Writs of summons were served on the bank and on Anna Ritchie and Agnes Gadalla, Co-executrices of the last will of Paul Plisk, deceased. On March 8, 1945 the bank filed its appearance and a petition representing that at the time of the death of defendant it had on deposit to his credit the sum of \$2,014.83; that it had expended \$5 in filing its appearance and had incurred certain attorney's fees in the matter, and prayed that an order be entered authorizing and directing it to deposit the balance of the funds with the clerk of the court, or with such other party as the court might determine, to be held until the final order of the court determining who was entitled to the funds, and that it be dismissed from the case. On March 8, 1945 an order was entered that the petition of the bank stand as its answer to the petition of plaintiff, and that the co-executrices be given leave to answer the petition within 30 days.

On March 12, 1945 the co-executrices filed a special appearance for the "sole purpose of questioning the jurisdiction of the court." On March 19, 1945 they filed a motion to dismiss plaintiff's petition and to dissolve the restraining orders on the

ground that plaintiff's claim had not been reduced to judgment, was not preferred, did not constitute a lien, that it abated upon the death of defendant prior to the making of the bank as a party defendant, and that the court had no jurisdiction of the subject matter.

On March 28, 1945 plaintiff, under the name of Emily Mitkus, filed an answer to the petition of the bank and denied that the bank was entitled to reimbursement for any sums other than court costs. On April 16, 1945 plaintiff filed a counterclaim in which she asked for a judgment against the bank for the difference between the amount which she might receive from a claim filed against the estate of deceased and the sum of \$2,014.63. On April 17, 1945, on motion of the attorneys for the bank, the court ordered that the order entered April 16, 1945, giving plaintiff leave to file an amended petition and counterclaim, be vacated, and that such petition and counterclaim be expunged from the record. On April 18, 1945, on motion of the coexecutrices, the court ordered that the petition and supplemental petition of plaintiff filed on October 4, 1944 and December 4, 1944 be dismissed, that the injunctions be dissolved, and that the bank pay all moneys standing to the credit of deceased to the coexecutrices. Plaintiff appeals.

Plaintiff states: "The Superior Court of Cook County having original jurisdiction over the subject matter and the parties, the same having been assumed and attached thereto, the court never lost its jurisdiction, nor did the appellant's cause of action abate by the death of the original defendant, whose coexecutors were substituted as parties in his place and stead. Survival of the proceeding is wrought by statute." Plaintiff cites Sec. 11 of the Abatement Act, (Sec. 11, Ch. 1, Ill. Rev. Stat. 1945) that when there is but one defendant in an action, proceeding or complaint,

Ground that plaintiff's claim had not been raised to judgment, was not preferred, did not constitute a lien, that it related upon the death of defendant prior to the making of the bank as a party defendant, and that the court had no jurisdiction of the subject matter.

On March 28, 1945 plaintiff, under the name of Emily Mitkus, filed an answer to the petition of the bank and denied that the bank was entitled to reimbursement for any sums other than court costs. On April 18, 1945 plaintiff filed a counterclaim in which she asked for a judgment against the bank for the difference between the amount which she might receive from a claim filed against the estate of deceased and the sum of \$3,014.83. On April 17, 1945, on motion of the attorneys for the bank, the court ordered that the order entered April 18, 1945, giving plaintiff leave to file an amended petition and counterclaim, be vacated, and that each petition and counterclaim be expunged from the record. On April 18, 1945, on motion of the co-executors, the court ordered that the petition and supplemental petition of plaintiff filed on October 4, 1944 and December 4, 1944 be dismissed, that the injunction be dissolved, and that the bank pay all moneys standing to the credit of deceased to the co-executors. Plaintiff appeals.

Plaintiff states: "The Superior Court of Cook County having original jurisdiction over the subject matter and the parties, the same having been assumed and attached thereto, the court never lost its jurisdiction, nor did the appellant's cause of action abate by the death of the original defendant, whose co-executors were substituted as parties in his place and stead. Survival of the proceeding is wrought by statute." Plaintiff cites Sec. 11 of the Abatement Act, (Sec. 11, Ch. 1, Ill. Rev. Stat. 1945) that when there is but one defendant in an action, proceeding or complaint,

and he dies before final judgment or decree, such action, proceeding or complaint shall not on that account abate, if it might be originally prosecuted against the heir, devisee, executor or administrator of such defendant, but the plaintiff, petitioner or complainant may suggest such death on the record, and shall, by order of the court, have summons against such person or legal representative, requiring him to appear and defend the action, proceeding or complaint, after which it may proceed as if it had been originally commenced against him, Plaintiff maintains that it was the duty of the court to determine the amount due her under the decree and to have ordered the amount credited to deceased's bank account paid over to her to apply on the amount found due her. In her brief, in support of her counterclaim against the bank, plaintiff argues that she was misled to her prejudice by the incorrect statement in the bank's letter of October 7, 1944 that there was no account in the name of her former husband. This counterclaim was asserted on the theory that the conduct of the bank in thus misleading her, was actionable. In the oral argument counsel for plaintiff stated that she was not asserting any claim against the bank in her counterclaim. This amounts to a withdrawal of the contentions asserted under her counterclaim and we will, therefore, not discuss the counterclaim.

In the brief filed by the coexecutrices, the following statement appears: "In plaintiff's brief it is stated that the executors insist that plaintiff's claim be filed in the Probate Court. We do not so insist, but we do maintain that in whatever court plaintiff files her claim she is an ordinary creditor and can expect no greater remedy, but that her claim when proved, be ordered paid in due course of administration. Further, that in

and he dies before final judgment or decree, such action, proceeding or complaint shall not on that account abate, if it might be originally presented against the heir, devisee, executor or administrator of such defendant, but the plaintiff, petitioner or complainant may suggest such death on the record, and shall, by

order of the court, have summons against such person or legal representative, requiring him to appear and defend the action, proceeding or complaint, after which it may proceed as if it had been originally commenced against him. Plaintiff maintains that it was

the duty of the court to determine the amount due her under the decree and to have ordered the amount credited to deceased's bank account paid over to her to apply on the amount found due her. In her brief, in support of her counterclaim against the bank, plaintiff argues that she was misled to her prejudice by the incorrect statement in the bank's letter of October 7, 1944 that there was no account in the name of her former husband. This counterclaim was asserted on the theory that the conduct of the bank in thus misleading

her, was actionable. In the oral argument counsel for plaintiff stated that she was not asserting any claim against the bank in her

counterclaim. This amounts to a withdrawal of the contention asserted under her counterclaim and we will, therefore, not discuss

the counterclaim.

In the brief filed by the coexecutrices, the following

statement appears: "In plaintiff's brief it is stated that the executrices insist that plaintiff's claim be filed in the Probate Court. We do not so insist, but we do maintain that in whatever court plaintiff files her claim she is an ordinary creditor and can expect no greater remedy, but that her claim when proved, be ordered paid in due course of administration. Further, that in

insisting that her claim be paid with the entire funds in the bank, she is requesting relief she is not entitled to and which the court could not grant her, and that by so doing she has failed to state a cause of action." Sec. 18 of the Divorce Act, (Sec. 19, Ch. 40, Ill. Rev. Stat. 1945) provides that the court may enforce the payment of alimony and maintenance in any manner consistent with the rules and practice. Sec. 42 of the Chancery Act, (Sec. 42, Ch. 22, Ill. Rev. Stat. 1945) provides that the court may enforce a decree either by sequestration of real and personal estate, by attachment against the person, by fine or imprisonment, or both, by causing possession of the real and personal estate to be delivered to the party entitled thereto, or by ordering the demand of the complainant to be paid out of the effects or estate sequestered, or which are included in such decree, and by the exercise of such other powers as pertain to courts of chancery, and which may be necessary for the attainment of justice. Sec. 47 of the Chancery Act provides that when there shall be no direction that a master in chancery or commissioner execute a decree, the same may be carried into effect by execution, or other final process, according to the nature of the case, directed to the sheriff or other officer of the proper county, which shall have the same operation and force as similar writs issued upon a judgment at law. Defendant contends that any claim which plaintiff may have should be allowed as a claim of the seventh class, as provided in Sec. 202 of the Probate Act, (Sec. 354, Ch. 3, Ill. Rev. Stat. 1945). In Dinet v. Eigenmann, Admr. 80 Ill. 274, our Supreme Court said (279):

"But it is objected that the complainant, after recovering the decree for alimony, died, and that it has never been paid. * * * The legal liability of the husband for alimony was in the nature of an obligation or duty to a stranger. It was a duty imposed by the statute upon him to contribute to the support of the divorced

insisting that her claim be paid with the entire funds in the bank, she is requesting relief she is not entitled to and which the court could not grant her, and that by so doing she has failed to state a cause of action." Sec. 18 of the Divorce Act, 1891, 18, Ch. 40, Ill. Rev. Stat. 1945) provides that the court may enforce the payment of alimony and maintenance in any manner consistent with the rules and practice. Sec. 42 of the Chancery Act, (Sec. 42, Ch. 32, Ill. Rev. Stat. 1945) provides that the court may enforce a decree either by sequestration of real and personal estate, by attachment against the person, by fine or imprisonment, or both, by causing possession of the real and personal estate to be delivered to the party entitled thereto, or by ordering the demand of the complainant to be paid out of the effects or estate sequestered, or which are included in such decree, and by the exercise of such other powers as pertain to courts of chancery, and which may be necessary for the attainment of justice. Sec. 47 of the Chancery Act provides that when there shall be no direction that a master in chancery or commissioner execute a decree, the same may be carried into effect by execution, or other final process, according to the nature of the case, directed to the sheriff or other officer of the proper county, which shall have the same operation and force as similar writs issued upon a judgment at law. Defendant contends that any claim which plaintiff may have should be allowed as a claim of the seventh class, as provided in Sec. 302 of the Probate Act, (Sec. 354, Ch. 3, Ill. Rev. Stat. 1945). In Dinet v. Wisniewski, 354 Ill. 274, our Supreme Court said (279):

"But it is objected that the complainant, after recovering the decree for alimony, died, and that it has never been paid. * * * The legal liability of the husband for alimony was in the nature of an obligation or duty to a stranger. It was a duty imposed by the statute upon him to contribute to the support of the divorced

wife; and when the amount was ascertained and fixed, the right to the money became vested and as fully fixed as had the money been paid or the husband had given his note for the amount. The husband could not resume it, nor did he become entitled to it on her death. It was absolutely the wife's, and went to her representatives precisely as would any other money decree against any other person. It, then, follows that her executor or administrator had the right to proceed and collect it in the same manner that any other decree could be enforced after the death of the person in whose favor it was rendered."

In the case of In re Estate of Kossuth H. Bell, 210 Ill. App. 350, we said that the claim of a widow against her husband's estate for the amount unpaid under a decree for alimony is to be treated as any other obligation of the deceased at the time of his death and is recoverable as a claim of the seventh class.

The orders granting the injunction restraining the bank and its agents from disbursing the funds were not the equivalent of the service of a garnishment summons, or the service of a writ of attachment. All these injunctions sought to do was to restrain the bank from paying out the funds. This they accomplished. Plaintiff did not have a judgment entered against defendant during his lifetime. On his death her position as to the alimony and support money then due was the same as the position of any other person having a seventh class claim. In our opinion Sec. 11 of the Abatement Act does not affect plaintiff's position as a claimant against the estate. That section permits certain actions and proceedings to continue against the personal representative of a sole defendant. Whether the case is tried in the Circuit or Superior Court or in the Probate Court, plaintiff could not have her claim for the accrued alimony and support money allowed except as a seventh class claim.

The chancellor was right in refusing plaintiff the relief she sought. We do not know whether plaintiff, as a safeguard, filed a claim in the Probate Court within the nine months allowed by the Probate Act. In view of the statement of defendants that they do

wife; and when the amount was ascertained and fixed, the right to the money became vested and as fully fixed as had the money been paid or the husband had given his note for the amount. The husband could not resume it, nor did he become entitled to it on her death. It was absolutely the wife's, and went to her representatives precisely as would any other money decreed against any other person. It, then, follows that her executor or administrator had the right to process and collect it in the same manner that any other decree could be enforced after the death of the person in whose favor it was rendered."

In the case of In re Estate of Kenneth H. Bell, 210 Ill. App. 350,

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the amount unpaid under a decree for alimony is to be treated as

any other obligation of the deceased at the time of his death and is

recoverable as a claim of the seventh class.

The orders granting the injunction restraining the bank

and its agents from disbursing the funds were not the equivalent

of the service of a garnishment summons, or the service of a writ

of attachment. All these injunctions sought to do was to restrain

the bank from paying out the funds. This they accomplished. Plain-

tiff did not have a judgment entered against defendant during his

lifetime. On his death her position as to the alimony and support

money then due was the same as the position of any other person

having a seventh class claim. In our opinion Sec. 11 of the Abatement

Act does not affect plaintiff's position as a claimant against the

estate. That section permits certain motions and proceedings to

continue against the personal representative of a sole defendant.

Whether the case is tried in the Circuit or Superior Court or in

the Probate Court, plaintiff could not have her claim for the accrued

alimony and support money allowed except as a seventh class claim.

The Chancellor was right in refusing plaintiff the relief

she sought. We do not know whether plaintiff, as a safeguard, filed

a claim in the Probate Court within the nine months allowed by the

Probate Act. In view of the statement of defendants that they do

not insist that she file her claim in the Probate Court, we feel that she should be given an opportunity to have it allowed in the Superior Court. For the reasons stated the order of the Superior Court of Cook County is reversed and the cause remanded with directions to enter an order allowing plaintiff's claim in the amount the court shall find was due at the time of deceased's death, against Anna Ritchie and Agnes Gedraitis, as coexecutrices of the estate of Paul Pilackus, deceased, as a seventh class claim, to be paid in due course of administration; that the injunctions be dissolved and that the State Bank of Clearing pay the amount standing to the credit of Paul Pilackus (alias Paul Platz) deceased, less its costs, to Anna Ritchie and Agnes Gedraitis, coexecutrices of the estate of Paul Pilackus, deceased; and that the costs in the Superior Court and in this court be assessed against plaintiff.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY, P.J. AND LEWE, J. CONCUR.

not insist that she file her claim in the Probate Court, we feel that she should be given an opportunity to have it allowed in the Superior Court. For the reasons stated the order of the Superior Court of Cook County is reversed and the cause remanded with

directions to enter an order allowing plaintiff's claim in the

amount the court shall find was due at the time of deceased's

death, against Anna Ritchie and Agnes Gedraitis, as coexecutrices of the estate of Paul Pilskus, deceased, as a seventh class claim,

to be paid in due course of administration; that the instructions

be dissolved and that the State Bank of Clearing pay the amount standing to the credit of Paul Pilskus (alias Paul Platz), deceased,

less its costs, to Anna Ritchie and Agnes Gedraitis, coexecutrices

of the estate of Paul Pilskus, deceased; and that the costs in

the Superior Court and in this court be assessed against plaintiff.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILLY, P.J. AND LEWIS, J. CONCUR.

43089

LOUIS H. FREISE,

Appellant,

v.

MID-CITY TRUST AND SAVINGS BANK
OF CHICAGO, a banking corporation,
and MID-CITY NATIONAL BANK OF
CHICAGO, a banking corporation,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

322 I.A. 126²

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is the second appeal of this cause. Plaintiff, Louis H. Freise, a licensed real estate and insurance broker, filed his amended complaint in chancery for an accounting and to recover commissions in the sum of \$750,000 alleged to be due him from the defendants Mid-City Trust and Savings Bank of Chicago, a banking corporation, and Mid-City National Bank of Chicago, a banking corporation, for services rendered by him as such broker while employed by the defendants. At the close of plaintiff's case, defendants' motion for a finding in their favor was allowed by the chancellor and the amended complaint dismissed for want of equity. Plaintiff appeals.

Plaintiff was employed by the Mid-City Trust and Savings Bank (hereinafter called "Savings Bank") from March 16, 1920 to March 1, 1922, and reemployed from July 1, 1923 to March 23, 1933, when he resigned at the request of the president. During the period from November 20, 1923 until his resignation March 23, 1933, plaintiff served as manager of the real estate loan department and as a member of the real estate committee. In that capacity he "consummated deals" on real estate with the owners of property or brokers representing them, inspected and appraised real estate, and wrote insurance. In January, 1929,

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43029

LOUIS H. FRIESE,

Appellant,

v.

MID-CITY TRUST AND SAVINGS BANK
OF CHICAGO, a banking corporation,
and MID-CITY NATIONAL BANK OF
CHICAGO, a banking corporation,

Appellees.

SUPERIOR COURT

APPEAL FROM

COOK COUNTY.

3201 A 126

THE JUSTICE THAT DELIVERED THE OPINION OF THE COURT.

This is the second appeal of this cause. Plaintiff,

Louis H. Friese, a licensed real estate and insurance broker,

filed his amended complaint in the county for an accounting and

to recover commissions in the sum of \$750,000 alleged to be due

him from the defendants Mid-City Trust and Savings Bank of

Chicago, a banking corporation, and Mid-City National Bank of

Chicago, a banking corporation, for services rendered by him as

such broker while employed by the defendants. At the close of

plaintiff's case, defendants' motion for a finding in their favor

was allowed by the chancellor and the amended complaint dismissed

for want of equity. Plaintiff appeals.

Plaintiff was employed by the Mid-City Trust and

Savings Bank (hereinafter called "Savings Bank") from March 16,

1920 to March 1, 1922, and reemployed from July 1, 1922 to March

23, 1923, when he resigned at the request of the president.

During the period from November 20, 1922 until his resignation

March 23, 1923, plaintiff served as manager of the real estate

loan department and as a member of the real estate committee. In

that capacity he "conducted deals" on real estate with the

owners of property or brokers representing them, inspected and

appraised real estate, and wrote insurance. In January, 1922,

he was elected cashier. On May 8, 1933, defendant Mid-City National Bank of Chicago, a banking corporation (hereinafter called "National Bank") entered into a written contract with Savings Bank whereby National Bank purchased all the assets of Savings Bank and assumed all of its liabilities. The gist of the amended bill of complaint is that plaintiff, at the special instance and request of defendant Savings Bank, procured licenses as a real estate and insurance broker from the State of Illinois and the City of Chicago for the purpose of conducting the real estate loan and insurance department of Savings Bank and for the conduct of a general real estate brokerage business and charging commissions therefor; that he managed and conducted in his own name and in connection with Savings Bank an extensive real estate brokerage and real estate loan and insurance business. Defendant Savings Bank had collected and retained from various customers and others large commissions and fees which should have been paid to plaintiff because Savings Bank was not licensed to conduct a brokerage business; that payments on account of such commissions were made to the plaintiff from time to time, and the Savings Bank provided him, without charge, desk room on the premises of the bank as well as stationery, telephone, telegraph services, and clerks. It is further alleged that Savings Bank caused records to be kept of all the transactions covering collection of fees and commissions earned by plaintiff, as well as the payments made to him on account thereof, and that these records are now in the possession of the defendants; that plaintiff demanded of defendants an accounting of the moneys due him, which they declined and refused to furnish.

On the first trial, each defendant filed a general and special demurrer to the bill. The chancellor overruled the demurrer

he was elected cashier. On May 8, 1883, defendant Mid-City National Bank of Chicago, a banking corporation (hereinafter called "National Bank") entered into a written contract with Savings Bank whereby National Bank purchased all the assets of Savings Bank and assumed all of its liabilities. The gist of the amended bill of complaint is that plaintiff, at the special instance and request of defendant Savings Bank, procured license as a real estate and insurance broker from the State of Illinois and the City of Chicago for the purpose of conducting the real estate loan and insurance department of Savings Bank and for the conduct of a general real estate brokerage business and charging commissions therefor; that he entered and conducted in his own name and in connection with Savings Bank an extensive real estate brokerage and real estate loan and insurance business. Defendant Savings Bank had collected and retained from various customers and others large commissions and fees which should have been paid to plaintiff because Savings Bank was not licensed to conduct a brokerage business; that payments on account of such commissions were made to the plaintiff from time to time, and the Savings Bank provided him, without charge, desk room on the premises of the bank as well as stationery, telephone, telegraph services, and clerks. It is further alleged that Savings Bank caused records to be kept of all the transactions covering collection of fees and commissions earned by plaintiff, as well as the payments made to him on account thereof; and that these records are now in the possession of the defendant; that plaintiff demanded of defendant an accounting of the moneys due him, which they declined and refused to furnish.

On the first trial, each defendant filed a general and special answer to the bill. The chancellor overruled the demurrer

of Savings Bank and sustained the demurrer of the National Bank, and dismissed the bill as to it for want of equity. Plaintiff appealed from that portion of the decree dismissing the bill as to National Bank. This court reversed the decree, sustaining the demurrer of National Bank to the amended bill and dismissing it for want of equity (280 Ill. App. 622). After the cause was remanded to the trial court, the defendants filed answers. The answers averred substantially that the plaintiff was an employee and during the period of his employment his salary ranged from \$4,000 to \$7,500 annually, that as an employee it was his duty to account to defendant for all commissions received from any source in the course of his employment and that in connection with the banking business, Savings Bank conducted a real estate loan and insurance department and had the power to lend money on personal and real estate securities and the right to charge commissions therefor. Defendants further denied that Savings Bank ever made any payment on account of commissions to plaintiff, and aver that plaintiff's claim was barred by the statute of limitations and laches.

Replications were filed by plaintiff to the answers, denying that the salary received by plaintiff included or could include the alleged commissions earned by him, and denied that defendants had any legal right to charge commissions.

Plaintiff's principal contention is that Savings Bank had no authority under the law to act either as an insurance broker or as a real estate broker and collect commissions therefor, and that the fact that defendant Savings Bank paid plaintiff a fixed salary during the entire period of his employment does not bar plaintiff's claim for commissions, since an agreement to accept a stated salary in lieu of commissions earned as a broker is against public policy. In support of his position, plaintiff cites Anderson v. City of Jacksonville, 380 Ill. 44; George v. City of Danville, 383 Ill. 454; State Bank of Blue Island v. Benzing, 383 Ill.

of Savings Bank and sustained the judgment of the National Bank, and dismissed the bill as to its former part. Plaintiff appealed from that portion of the decree dismissing the bill as to National Bank. This court reversed the decree, sustaining the judgment of National Bank to the amended bill and dismissing it for want of equity (250 Ill. App. 622). After the case was remanded to the trial court, the defendants filed answers. The answers averred substantially that the plaintiff was an employee and during the period of his employment his salary ranged from \$4,000 to \$7,500 annually, that as an employee it was his duty to account to defendant for all commissions received from any source in the course of his employment and that in connection with the banking business, Savings Bank conducted a real estate loan and insurance department and had the power to lend money on personal and real estate securities and the right to charge commissions therefor. Defendants further denied that Savings Bank ever made any payment on account of commissions to plaintiff, and aver that plaintiff's claim was barred by the statute of limitations and laches. Applications were filed by plaintiff to the answers, denying that the salary received by plaintiff included or could include the alleged commissions earned by him, and denied that defendant had any legal right to charge commissions. Plaintiff's principal contention is that Savings Bank had no authority under the law to act either as an insurance broker or as a real estate broker and collect commissions therefor, and that the fact that defendant Savings Bank paid plaintiff a fixed salary during the entire period of his employment does not bar plaintiff's claim for commissions, since an agreement to accept a stated salary in lieu of commissions earned as a broker is against public policy. In support of his position, plaintiff cites Anderson v. City of Jacksonville, 380 Ill. 44; George v. City of Peoria, 383 Ill. 454; State Bank of Blue Island v. Bennett, 383 Ill.

40; Leigh v. American Brake Beam Co., 205 Ill. 147; and Pitsch v. Continental Bank, 305 Ill. 265, particularly stressing the latter two cases.

In the Pitsch case, the claim of plaintiff, a notary public, was for money had and received to his use by the bank for notarial services rendered by the plaintiff. The court held (305 Ill. 272) that, "the whole matter of fixing his compensation for official services by private contract when it is already fixed by law was contrary to public policy and the contract was therefore void." Since real estate brokers' fees are not fixed by statutes we do not think this case has any application to the case at bar. In Chicagoland Agencies v. Palmer, 364 Ill. 13, the court held that provisions of Sec. 11 of Ch. 73 relating to insurance agents and solicitors was unconstitutional. All the other cases cited by plaintiff hold in effect that where a contract is ultra vires or against public policy no recovery can be had. The factual situations, however, are not the same as or similar to that in the present case. In the instant case Savings Bank lent its own funds and charged commissions therefor. So far as the record discloses, it did not engage in a general brokerage business. To perform its corporate functions we think the Savings Bank had the right to use its funds as disclosed by this record. This power is clearly incidental to the express power granted banks under Section 1, ch. 16 $\frac{1}{2}$ relating to banks, page 235 Ill. Rev. Stats. 1945.

The allegations of the amended complaint were construed in the former appeal (280 Ill. App. 622). There the court said:

"The bill is not predicated upon the theory that complainant performed a brokerage service for Savings Bank, nor that he received any compensation from Savings Bank for such services, nor that any compensation was agreed upon for such services. When its allegations are reasonably construed the theory of fact of the bill is that complainant operated the business in his own name under licenses issued to him, that Savings Bank collected the fees due him, made certain payments on account of the same to him, but ~~was~~ withheld large sums of money rightfully belonging

two cases, Continental Bank, 303 Ill. 282, particularly stressing the latter 40; Leach v. American Brake Beam Co., 205 Ill. 147; and Ritch v.

In the Ritch case, the claim of plaintiff, a notary public, was for money had and received to him as by the bank for notarial services rendered by the plaintiff. The court held (305 Ill. 272) that, "the whole matter of fixing his compensation for official services by private contract when it is already fixed by law was contrary to public policy and the contract was therefore void." Since real estate brokers' fees are not fixed by statutes we do not think this case has any application to the case at bar. In Chicago and American v. Palmer, 304 Ill. 13, the court held that provisions of Sec. 11 of Ch. 73 relating to insurance agents and solicitors was unconstitutional. All the other cases cited by plaintiff held in effect that where a contract is ultra vires or against public policy no recovery can be had. The factual situations, however, are not the same as or similar to that in the present case. In the instant case Savings Bank lent its own funds and charged commissions therefor. So far as the record discloses, it did not engage in a general brokerage business. To perform its corporate functions we think the Savings Bank had the right to use its funds as disclosed by this record. This power is clearly incidental to the express power granted banks under Section 1, ch. 183 relating to banks, page 233 Ill. Rev. Stats. 1945.

The allegations of the amended complaint were construed in the former appeal (280 Ill. App. 822). There the court said: "The bill is not predicated upon the theory that complainant performed a brokerage service for Savings Bank. Nor that he received any compensation from Savings Bank for such services, nor that any compensation was agreed upon for such services. When its allegations are reasonably construed the theory of fact of the bill is that complainant operated the business in his own name under license issued to him, that Savings Bank collected the fees due him, made certain payments on account of the same to him, but has withheld large sums of money rightfully belonging

to him."

In the opinion rendered by the chancellor (Abst. 33) it appears that this is the theory which he adopted.

The record discloses that the only testimony offered was that of plaintiff. He testified that when he was reemployed about July 1, 1923, he talked with William J. Rathje the then president of Savings Bank. Defendants' counsel objected to the alleged conversation between plaintiff and Rathje, basing his objection upon Section 4 of the Evidence Act. It appearing that Rathje had died in October, 1932, the chancellor sustained the objection. Plaintiff's counsel then offered to prove that Rathje as president of defendant Savings Bank requested plaintiff to take out broker's licenses and to conduct a real estate department of the bank for himself since the bank was not permitted to do a real estate or insurance business. An objection was also sustained to the foregoing offer. Plaintiff further testified: "I never had a written contract with defendant Savings Bank and was never employed by defendant National Bank; Mills requested me to resign and I accepted his orders and cleaned out my desk; then I mentioned to him (Mills) 'How about all these commissions on the real estate loans and insurance commissions.' 'Well,' he said, 'we will have to see about that.'" Since the foregoing proof offered by plaintiff failed to support the allegations of the amended bill of complaint, the chancellor properly sustained defendants' motion at the close of plaintiff's case.

For the reasons indicated, the order dismissing the bill for want of equity is affirmed.

AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

AFFIRMED.

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43133

ELMER C. KRAUTER,

Appellant,

v.

ROBERT S. ADLER, ALBERT K.
ORSCHER, ABRAHAM GREENSPAHN
and MAX ADLER,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

328 I.A. 127

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action at law brought by plaintiff, a real estate broker, to recover damages resulting from defendants' wrongful dissolution of a corporation with which he had a contract for broker's commissions. Plaintiff appeals from an order sustaining defendants' motion to strike his second amended complaint.

From the allegations of the second amended complaint it appears that the plaintiff procured the Illinois Bond Stores, Incorporated, hereinafter called Bond Stores, as a tenant for the 6339 South Halsted Street Building Corporation, hereinafter called "Corporation"; that the Bond Stores, entered into a written lease with the Corporation which provided, inter alia, that it would pay annually to the Corporation additional rental above a fixed minimum based on the gross sales of certain merchandise; that the plaintiff was to receive an additional broker's commission annually amounting to 5 per cent of the additional rental received by the Corporation from Bond Stores; that the plaintiff received the additional broker's commissions for the years 1935, 1936 and 1937; and that Bond Stores, still remains in possession of the premises under the lease with the Corporation and continues to pay the additional rental due under its terms,

ELMER C. KRAVITZ,

Appellant,

v.

ROBERT W. ALLEN, ALBERT K. ORWELL, ABRAHAM GALLINERMAN and MAX ALLEN,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

3281A.127

MR. JUSTICE LEVE DELIVERED THE OPINION OF THE COURT.

This is an action at law brought by plaintiff, a

real estate broker, to recover damages resulting from defendants' wrongful dissolution of a corporation with which he had a contract for broker's commissions. Plaintiff appeals from an order sustaining defendants' motion to strike his second amended complaint.

From the allegations of the second amended complaint it appears that the plaintiff procured the Illinois Bond Stores, Incorporated, hereinafter called Bond Stores, as a tenant for the 6239 South Halsted Street Building Corporation, hereinafter called "Corporation"; that the Bond Stores, entered into a written lease with the Corporation which provided, inter alia, that it would pay annually to the Corporation additional rental above a fixed minimum based on the gross sales of certain merchandise; that the plaintiff was to receive an additional broker's commission annually amounting to 5 per cent of the additional rental received by the Corporation from Bond Stores; that the plaintiff received the additional broker's commissions for the years 1935, 1936 and 1937; and that Bond Stores, still remains in possession of the premises under the lease with the Corporation and continues to pay the additional rental due under its terms,

but that the plaintiff has not received 5 per cent thereof annually since 1937, as provided in the agreement (Plaintiff's Exhibit A) between the plaintiff and the Corporation.

The plaintiff further alleges that in 1935 defendants conspired, combined and confederated among themselves to avoid the payment of the additional broker's commissions due plaintiff and, as part of the conspiracy and without notice to the plaintiff, the defendants caused the corporation to be dissolved by their willful refusal to pay the franchise taxes; that after the dissolution of the Corporation, defendants acting as officers of a de facto corporation conveyed the interests of the Corporation to the defendant Robert S. Adler who, acting in pursuance of said conspiracy and with the connivance and assistance of the other defendants, sold the premises now occupied by Bond Stores, to one Ryan; that afterwards defendants distributed the proceeds of the sale of the premises among themselves; and that defendants, fearing they would be held to account to the plaintiff for the additional broker's commissions, procured an indemnity agreement from Ryan to save themselves harmless from any action instituted by the plaintiff against the defendants.

Plaintiff's theory is that it is an actionable wrong for those in control of a corporation and who will receive its assets to dissolve a corporation to escape the performance of its contracts. Defendants' contentions are that the complaint does not state a cause of action, and that the suit was not brought within two years after the date of the dissolution.

The English doctrine announced in Lumley v. Gye, 2 Ellis & Blackburn, 216, and Bowen v. Hall, 50 L. J. Q. B. 305, has been generally followed in Illinois. In Bloom v. Bohemians, Inc., 223 Ill. App. 269, at p. 274, the court said:

but that the plaintiff has not received 5 per cent thereof annually since 1937, as provided in the agreement (Exhibit A) between the plaintiff and the Corporation.

The plaintiff further alleges that in 1935 defendants conspired, combined and confederated among themselves to avoid the payment of the additional broker's commissions due plaintiff, and, as part of the conspiracy and without notice to the plaintiff, the defendants caused the corporation to be dissolved by their willful refusal to pay the franchise taxes; that after the dissolution of the Corporation, defendants acting as officers of a de facto corporation conveyed the interests of the Corporation to the defendant Robert B. Miller who, acting in pursuance of said conspiracy and with the connivance and assistance of the other defendants, sold the premises now occupied by Bond Stores, to one Ryan; that afterwards defendants distributed the proceeds of the sale of the premises among themselves; and that defendants, fearing they would be held to account to the plaintiff for the additional broker's commissions, procured an indemnity agreement from Ryan to save themselves harmless from any action instituted by the plaintiff against the defendants.

Plaintiff's theory is that it is an actionable wrong for those in control of a corporation and who will receive its assets to dissolve a corporation to escape the performance of its contracts. Defendants' contentions are that the complaint does not state a cause of action, and that the suit was not brought within two years after the date of the dissolution.

The English doctrine announced in Lindsay v. Gye, 2 Allia & Blackburn, 216, and Goven v. Hall, 50 L. J. Q. B. 305, has been generally followed in Illinois. In Ploom v. Bohemian, Inc., 323 Ill. App. 269, at p. 274, the court said:

"The theory of this doctrine is that a party to a contract has a property right therein which a third person has no more right maliciously to deprive him of, or injure him in, than he would to injure his property real or personal, and that therefore such an injury amounts to a tort for which the injured party may claim compensation by an action in tort for damages."

The same doctrine was approved in Doremus v. Hennessy, 176 Ill. 608, 617; London Guarantee Co. v. Horn, 206 Ill. 493, 504; and Meadowmoor Dairies v. Drivers' Union, 371 Ill. 377, 381; 41 Harvard Law Review 728.

In considering the defendants' motion to strike, we must assume that the allegations of the second amended complaint are true. All of the stock of the Corporation was actually owned and controlled by defendant Max Adler. About nine months after plaintiff's contract (Exhibit A) with the Corporation was executed, the legal existence of the corporation was terminated by the defendants. Although the Corporation was no longer in existence, plaintiff received payments on account of his broker's commissions for two years after its dissolution. These payments, plaintiff charges, were made to deceive him. After the sale of the premises to Ryan, the proceeds were shared among the defendants. In effect, the Corporation was used by the defendants as a subterfuge to rid themselves of an obligation to the plaintiff.

Since the law has been long established that the plaintiff had a property right in his contract for broker's fees with the Corporation, we see no reason why he cannot recover for the injury sustained as a result of defendants' wrongful acts. The plaintiff's second amended complaint contains all the essential elements of an action in tort for damages.

This brings us to a consideration of the defendants' next contention, that the suit was not brought within two years after the dissolution of the Corporation. The record discloses that the original complaint, as well as the second amended complaint,

"The theory of this doctrine is that a party to a contract has a property right therein which a third person has no more right maliciously to deprive him of, or injure him in, than he would to injure his property real or personal, and that therefore such an injury amounts to a tort for which the injured party may claim compensation by an action in tort for damages."

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617; London Guarantee Co. v. Bortner, 208 Ill. 493, 504; and

Meadowbrook Dairies v. Dwyer, 271 Ill. 377, 381; 41 Harvard

Law Review 728.

In considering the defendants' motion to strike, we must

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Although the Corporation was no longer in existence, plaintiff received payments on account of his broker's commissions for two years after its dissolution. These payments, plaintiff charges, were made to deceive him. After the sale of the premises to Ryan, the proceeds were shared among the defendants. In effect, the Corporation was used by the defendants as a subterfuge to rid themselves of an obligation to the plaintiff.

Since the law has been long established that the plaintiff

had a property right in his contract for broker's fees with the Corporation, we see no reason why he cannot recover for the injury sustained as a result of defendants' wrongful acts. The plaintiff's second amended complaint contains all the essential elements of an action in tort for damages.

This brings us to a consideration of the defendants' next contention, that the suit was not brought within two years after the dissolution of the Corporation. The record discloses that the original complaint, as well as the second amended complaint,

was predicated on the theory of the wrongful dissolution of the Corporation by the defendants, thereby making it impossible for it to perform its agreement with the plaintiff. Since it involves the "same transaction or occurrence", the filing of the second amended complaint is permissible under Section 46 of the Civil Practice Act. (Metropolitan Trust Co. v. Bowman Dairy, 369 Ill. 222; Graves v. Needham, 379 Ill. 25.)

Nor is the action barred by Section 94 of the Business Corporation Act, since the complaint is not predicated upon the theory that the defendants are liable as officers, directors or stockholders of the Corporation. When reasonably construed, the allegations of the complaint show that the defendants conspired to destroy the Corporation, sell its assets, and pocket the proceeds, all to the injury of the plaintiff. The mere fact that they held offices in the Corporation does not change the character of their liability. If they had not held such offices but had committed the acts complained of, their liability would have been the same under the circumstances. We are therefore impelled to hold that the period during which suit may be instituted is governed by Section 15 of the Limitations Act (Ch. 83, Sec. 16, Rev. Stats. 1939).

Defendant also urges that the entire agreement is without consideration because it is based on a past consideration. The amended complaint alleges that plaintiff was engaged prior to September 4, 1934 to procure a tenant. We must therefore assume that the engagement of the plaintiff took place before the execution of the lease between the Corporation and the Bond Stores. Even so, a past consideration for the promise is sufficient under the circumstances, since it appears that the services were rendered by the plaintiff at the request of the corporation. (Winefield v. Feder, 169 Ill. App. 480; Williston on Contracts, Vol. 1, p. 519.) We consider defendants' contentions untenable.

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Corporation Act, since the complaint is not predicated upon the theory that the defendants are liable as officers, directors or stockholders of the Corporation. When reasonably construed, the allegations of the complaint show that the defendants conspired to destroy the Corporation, sell its assets, and conduct the proceeds, all to the injury of the plaintiff. The mere fact that they held office in the Corporation does not change the character of their liability. If they had not held such offices but had committed the acts complained of, their liability would have been the same under the circumstances. We are therefore impelled to hold that the period during which suit may be instituted is governed by Section 16 of the Limitations Act (Ch. 85, Sec. 16, Rev. Stat. 1932).

Defendant also urges that the entire agreement is without consideration because it is based on a past consideration. The amended complaint alleges that plaintiff was engaged prior to September 4, 1934 to procure a tenant. We must therefore assume that the engagement of the plaintiff took place before the execution of the lease between the Corporation and the Bond Stores. Even so, a past consideration for the promise is sufficient under the circumstances, since it appears that the services were rendered by the plaintiff at the request of the corporation. (Winnfield v. Feder, 129 Ill. 480; Williston on Contracts, Vol. 1, p. 519.) We consider defendants' contentions untenable.

For the reasons stated, the order sustaining the defendants' motion to strike is reversed and the cause is remanded with directions to proceed in a manner not inconsistent with this opinion.

REVERSED AND REMANDED.

KILEY, P.J. AND BURKE, J. CONCUR.

For the reasons stated, the order sustaining the
defendants' motion to strike is reversed and the case is remanded
with directions to proceed in a manner not inconsistent with
this opinion.

REVEREND AND REMANDED.

KILBY, P.J. AND BURKE, J. CONCUR.

43145

CHARLES R. WHITE,

Appellant,

v.

AMERICAN ELECTRIC FUSION CORPORATION,
a corporation, and EDMUND J. HENKE,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

328 I.A. 128

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff, Charles R. White, brought an action at law against the defendants American Electric Fusion Corporation, a corporation (hereinafter called "corporation") and Edmund J. Henke, for breach of a written employment contract. There was a jury trial, a verdict and judgment in plaintiff's favor for \$2500. Thereafter defendants moved for a judgment non obstante veredicto and for a new trial. The court entered judgment non obstante veredicto and dismissed the suit. Plaintiff appeals.

The complaint alleges, in substance, that on October 10, 1942 defendants, in writing, offered to and did employ plaintiff in the capacity of commercial director of defendants' business for a term of one year from about November 1, 1942 at the yearly salary of \$12,000; that on October 13, 1942, plaintiff, in writing, accepted said offer of employment; that, pursuant to said agreement, plaintiff entered the employment of defendants and continued therein from October 26, 1942 to December 18, 1942 and performed all the terms and conditions required of him by said contract of employment; that on December 18, 1942 defendants wrongfully discharged plaintiff and since that time have prevented him from performing his part of the agreement, although plaintiff has duly tendered his services to defendants; wherefore the plaintiff asks judgment in the sum of \$8,187.11.

CHARLES H. WHITE

Appellant

v.

AMERICAN ELECTRIC FUSION CORPORATION,
a corporation, and EDWARD J. HENKE,
a corporation

Appellees

323 L.A. 128

COOK COUNTY

CIRCUIT COURT

APPEAL FROM

MR. JUSTICE LAKE DELIVERED THE OPINION OF THE COURT.

Plaintiff, Charles H. White, brought an action at law against the defendants American Electric Fusion Corporation, a corporation (hereinafter called "corporation") and Edward J. Henke, for breach of a written employment contract. There was a jury trial, a verdict and judgment in plaintiff's favor for \$2500. Thereafter defendants moved for a judgment non obstante verdicto and for a new trial. The court entered judgment non obstante verdicto and dismissed the suit. Plaintiff appeals.

The complaint alleges, in substance, that on October 10, 1942 defendants, in writing, offered to and did employ plaintiff in the capacity of commercial director of defendants' business for a term of one year from about November 1, 1942 at the yearly salary of \$2,000; that on October 12, 1942, plaintiff, in writing, accepted said offer of employment; that, pursuant to said agreement, plaintiff entered the employment of defendants and continued therein from October 12, 1942 to December 12, 1942 and performed all the terms and conditions required of him by said contract of employment; that on December 12, 1942 defendants wrongfully discharged plaintiff and since that time have prevented him from performing his part of the agreement, although plaintiff has duly tendered his services to defendants; wherefore the plaintiff asks judgment in the sum of \$2,187.11.

Defendants' offer of employment and plaintiff's acceptance, marked Exhibits A and B, respectively, are attached to the complaint and the material portions read as follows:

Exhibit "A"

"American Electric Fusion Corporation.

October 10th, 1942.

"Mr. Charles R. White.

"Dear Mr. White:

"This will confirm our mutual agreement for your employment by this Corporation.

"You have been tendered, and accepted a position of Commercial Director, beginning your duties approximately November 1st, 1942.

"Your compensation will be as follows:

"Six thousand (\$6,000.00) dollars per year will be paid to you by the American Electric Fusion Corporation.

"Additional six thousand (\$6,000.00) dollars will be paid to you by the undersigned from his commission account.

"Remaining three thousand (\$3,000.00) dollars will be paid to you as a bonus on Thanksgiving day of each year,* this being the time when we usually distribute bonuses to other officials of this Corporation.

"I hope that your work with us will prove mutually profitable, and assure you of my hearty co-operation.

"Very truly yours,

"Edmund J. Henke,

"President.

"Edmund J. Henke: deM

"*Except 1942."

Exhibit "B"

"October 13th, 1942

"Mr. Edmund J. Henke,

"President American Electric Fusion Corporation,

"2600 Diversey Avenue,

"Chicago, Illinois.

"Dear Mr. Henke:

"This is to acknowledge receipt of your letter of October 10th, 1942 which sets forth our complete agreement, and for which I thank you.

"I shall report for duty November 1st, 1942, or before--if I can discharge my present responsibilities sooner; for I am eager to begin what I feel will be a most productive as well as a very happy association.

"Sincerely yours,

C. R. White."

Defendants' offer of employment and plaintiffs' acceptance, Exhibits A and B, respectively, are attached to the complaint and the material portions read as follows:

"Exhibit 'A'"

"American Electric Fusion Corporation.

October 10th, 1942.

"Mr. Charles R. White.

"Dear Mr. White:

"This will confirm our mutual agreement for your employment by this Corporation.
"You have been tendered, and accepted a position of Commercial Director, beginning your duties approximately November 1st, 1942.

"Your compensation will be as follows:

"Six thousand (\$6,000.00) dollars per year will be paid to you by the American Electric Fusion Corporation.

"Additional six thousand (\$6,000.00) dollars will be paid to you by the undersigned from his commission account.

"Remaining three thousand (\$3,000.00) dollars will be paid to you as a bonus on Thanksgiving day of each year,"

"this being the time when we usually distribute bonuses to other officials of this Corporation.

"I hope that your work with us will prove mutually

profitable, and assure you of my hearty co-operation.

"Very truly yours,

"Edmund J. Henke,

"President.

"Edmund J. Henke: Jan

"**Receipt 1942."

Exhibit "B"

"October 13th, 1942

"Mr. Edmund J. Henke,

"President American Electric Fusion Corporation,

"2800 Diversey Avenue,

"Chicago, Illinois.

"Dear Mr. Henke:

"This is to acknowledge receipt of your letter of October 10th, 1942 which sets forth our complete agreement,

and for which I thank you.

"I shall report for duty November 1st, 1942, or before--if I can discharge my present responsibilities sooner;

for I am eager to begin what I feel will be a most productive as well as a very happy association.

"Sincerely yours,

"C. R. White."

The corporation filed an answer which admits sending the letter Exhibit A and receiving from the plaintiff Exhibit B, but denies that said offer of employment was for the term of one year from November 1, 1942 or for any other term, and avers that said letter Exhibit A contained no definite term of employment whatever. The answer further avers that the plaintiff's services were unsatisfactory and that defendants therefore discharged him on December 17, 1942; that there was due the plaintiff the net sum of \$114.23 which was duly tendered to him as payment in full for his services rendered by him to and including December 17, 1942, but which plaintiff refused.

Defendant Henke in his answer denies that he, in writing, offered to and did employ the plaintiff, and alleges that any transactions concerning plaintiff's employment were with the corporation,

The evidence discloses that plaintiff and defendant Henke had several discussions relative to the duties of plaintiff as well as his compensation before sending the letters plaintiff's Exhibits A and B; that with reference to the duration of plaintiff's employment he testified that Henke said: "All right, if that division of salary or the way it is paid to you is satisfactory we will try it for a year." Henke testified that he "never told White that he was hired for any definite period of time."

Plaintiff contends that the stipulation in Exhibit A of compensation at "six thousand dollars per year" and "a bonus on Thanksgiving Day of each year," when "read with plaintiff's testimony in mind," warrants the conclusion that plaintiff's employment was for a year.

Defendants maintain in their argument that the contract of employment did not fix a definite time during which it should

employment did not fix a definite time during which it should Defendants maintain in their argument that the contract of for a year.

in mind," warrants the conclusion that plaintiff's employment was Thanksgiving Day of each year," when "read with plaintiff's testimony compensation at "six thousand dollars per year" and "a bonus on Plaintiff contends that the stipulation in Exhibit A of that he was hired for any definite period of time."

will try it for a year." Henke testified that he "never told White division of salary or the way it is paid to you is satisfactory we employment he testified that Henke said: "All right, if that Exhibits A and B; that with reference to the duration of plaintiff's as well as his compensation before sending the letters plaintiff's Henke had several discussions relative to the dates of plaintiff The evidence discloses that plaintiff and defendant corporation.

transactions concerning plaintiff's employment were with the offered to and did employ the plaintiff, and alleges that any Defendant Henke in his answer denies that he, in writing, but which plaintiff refused.

for his services rendered by him to and including December 17, 1942, sum of \$14.83 which was duly tendered to him as payment in full on December 17, 1942; that there was due the plaintiff the net were unsatisfactory and that defendant therefore discharged him whatever. The answer further avers that the plaintiff's services said letter Exhibit A contained no definite term of employment year from November 1, 1942 or for any other term, and avers that but denies that said offer of employment was for the term of one the letter Exhibit A and receiving from the plaintiff Exhibit B. The corporation filed an answer which admits sending

continue in force, and therefore was terminable at will.

In many states, courts have ruled that specification in the contract of an annual salary creates an inference of annual employment (100 A. L. R. 728), but in this state the rule has long been established that a hiring at a monthly or annual salary, if no period of duration is specified in the contract, is presumed to be at will and either party may terminate the hiring at his pleasure without liability. (Pfund v. Zimmerman, 29 Ill. 269; Orr v. Ward, 73 Ill. 318; Davis v. Fidelity Fire Ins. Co., 208 Ill. 375; Chadwick v. Morris & Co., 170 Ill. App. 569; Marquam v. Domestic Engineering Co., 210 Ill. App. 337; Odell v. Chicago Great Western Ry. Co. 212 Ill. App. 616; Fuchs v. Weibert, 233 Ill. App. 536.)

In his reply brief, plaintiff urges that defendants' letter, Exhibit A, "is simply a memorandum of an oral understanding and that it therefore became pertinent to inquire in our case as to just what the parties agreed upon, if it should be held that the memorandum has any latent ambiguity or omissions." We are unable to agree with plaintiff's position since his letter of acceptance, Exhibit B, states on its face that it is a complete expression of the whole agreement. Introduction of parol evidence by plaintiff, tending to prove a definite hiring for a year, was, in effect, an attempt to add another provision to the written agreement. Parol evidence cannot be admitted for this purpose. (Armstrong Paint Wks. v. Can Co., 301 Ill. 102, 106.) Nor does the omission of a specified date of termination of plaintiff's employment constitute an ambiguity. (Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 382.) The object of construction is to ascertain the intention which the parties have expressed in the language of the contract. (Abingdon Bk. & Tr. Co. v. Bulkeley, 390 Ill. 582; Harley v. Magnolia Petroleum Co., 378 Ill. 19, 28.)

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pleasure without liability. (Pruitt v. Zimmerman, 22 Ill. 289;

Gut v. Lutz, 73 Ill. 318; Davis v. Fidelity Fire Ins. Co., 708 Ill.

378; Chaswick v. Morris & Co., 170 Ill. App. 582; Marquand v.

Domestic Engineering Co., 210 Ill. App. 337; O'Neil v. Chicago Great

Western Ry. Co., 212 Ill. App. 618; Fuchs v. Keibart, 228 Ill. App.

656.)

In his reply brief, plaintiff urges that defendant's

letter, Exhibit A, "is simply a memorandum of an oral understanding

and that it therefore became pertinent to inquire in our case as

to just what the parties agreed upon, if it should be held that the

memorandum has any latent ambiguity or omission." We are unable

to agree with plaintiff's position since his letter of acceptance,

Exhibit B, states on its face that it is a complete expression of

the whole agreement. Introduction of parol evidence by plaintiff,

tending to prove a definite hiring for a year, was, in effect, an

attempt to add another provision to the written agreement. Parol

evidence cannot be admitted for this purpose. (Harrison Paint Works

v. Garfield, 301 Ill. 102, 106.) Nor does the omission of a specified

date of termination of plaintiff's employment constitute an ambiguity.

(Davis v. Fidelity Fire Ins. Co., 708 Ill. 318, 322.) The object of

construction is to ascertain the intention which the parties have

expressed in the language of the contract. (Alderton Bk. & Tr. Co.

v. Railway, 200 Ill. 522; Railway v. Macpherson Petroleum Co., 378

Ill. 22, 23.)

We have analyzed all the cases cited in the briefs and are of the opinion that the written agreement in the present case was an indefinite hiring, terminable at will, which alone warranted the trial judge in dismissing the suit. (Gage v. Village of Wilmette, 315 Ill. 328; First Mission Church v. Rockford Broadcasters, Inc., 324 Ill. App. 8.)

For the reasons given, the judgment non obstante veredicto is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

e have analyzed all the cases cited in the briefs
and are of the opinion that the written agreement in the present
case is an indefinite hiring, terminable at will, which alone
warranted the trial judge in dismissing the suit. (Case v.

Willard of Wilmette, 315 Ill. 328; First Mission Church v. Hookford

Broderick, Inc., 324 Ill. App. 8.)

For the reasons given, the judgment non obstante verdicto

is affirmed.

JUDGMENT AFFIRMED.

KILLY, P.J. AND BURKE, J. CONCUR.

43182

HATTIE GABL,

Appellant,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES, a corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

328 I.A. 128² 153

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Hattie Gabl filed her complaint in chancery against the defendant, The Equitable Life Assurance Society of the United States, a corporation, for specific performance of the terms of certain group life insurance policies issued by the defendant to International Register Company, a corporation, for the benefit of its employees, among whom was one Frank Gabl, deceased husband of the plaintiff, and to perform an alleged agreement made after the death of the insured relating to the distribution of the proceeds of the insurance. The complaint alleges that the insured was of unsound mind when he changed the name of the beneficiary from plaintiff to his daughter. The cause was referred to a master and in conformity with the findings and recommendations contained in the master's report, the chancellor dismissed the bill of complaint for want of equity. Plaintiff appeals.

In June, 1923, defendant, The Equitable Life Assurance Society of the United States, issued a group life insurance policy to International Register Company (hereinafter called "Register company") insuring the lives of certain employees. During 1925 and 1926, Frank Gabl (deceased husband of the plaintiff) an employee of Register company, became insured in the sum of \$2500 under the terms of the policies issued by the defendant to his employer. Evidencing the insurance were three certificates which named Frank Gabl's mother, Caroline Gabl, as beneficiary, with the right reserved in the insured to change the beneficiary.

HATTIE GABLI,

Plaintiff,

v.

THE HONOLULU LIFE ASSURANCE SOCIETY
OF THE UNITED STATES, a corporation,

A Defiant.

AFFIDAVIT FROM

SUPERIOR COURT

COOK COUNTY.

327 I.A. 128

MR. JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

Hattie Gabli filed her complaint in chancery against the

defendant, The Honolulua Life Assurance Society of the United States, a corporation, for specific performance of the terms of certain group life insurance policies issued by the defendant to International Register Company, a corporation, for the benefit of its employees, among whom was one Frank Gabli, deceased husband of the plaintiff, and to perform an alleged agreement made after the death of the insured relating to the distribution of the proceeds of the insurance. The complaint alleges that the insured was of unsound mind when he changed the name of the beneficiary from plaintiff to his daughter. The case was referred to a master and in conformity with the findings and recommendations contained in the master's report, the chancellor dismissed the bill of complaint for want of equity. Plaintiff appeals.

In June, 1923, defendant, The Honolulua Life Assurance Society of the United States, issued a group life insurance policy to International Register Company (hereinafter called "Register company") insuring the lives of certain employees. During 1925 and 1926, Frank Gabli (deceased husband of the plaintiff) an employee of Register company, became insured in the sum of \$500 under the terms of the policies issued by the defendant to his employer. Evidencing the insurance were three certificates which named Frank Gabli's mother, Caroline Gabli, as beneficiary, with the right reserved in the insured to change the beneficiary.

On December 19, 1931, the plaintiff and Frank Gabl the insured were married, and on August 12, 1932 the beneficiary was changed from Caroline Gabl to plaintiff. Afterwards, on October 12, 1936, Frank Gabl again changed the beneficiary to Lorraine Gabl, his daughter by a former marriage who was then a minor. For almost a year prior to his death on July 4, 1937, Frank Gabl had lived separate and apart from the plaintiff. On July 10, 1937, plaintiff served a written notice upon the defendant and the Register company that, "Frank Gabl was not of sound and disposing mind at the time he changed the name of the beneficiary in said certificates; that undue influence was practiced in order to induce him to make the change". On July 19, 1937, the Probate Court of Cook County appointed Fred Gabl and Anna Funk guardians of the person and estate of Lorraine Gabl, the insured's daughter. On October 20, 1937, the defendants paid the full amount of the proceeds of the certificates to the guardians of Lorraine Gabl.

The gist of the complaint is that on and after May 10, 1936, Frank Gabl, the insured, suffered from hallucinations; that he voluntarily became a patient of Alexian Brothers Hospital in the city of Chicago and subsequently became a patient at Veterans' Administration Hospital at Hines, Illinois; that after he left the Alexian Brothers Hospital and before he entered the Veterans' Administration Hospital he became a victim of undue influence; that while of unsound mind he was induced to change the beneficiaries; that after the death of the insured the defendant proposed and the plaintiff agreed in writing that the defendant pay "jointly" the insurance money due under the certificates, to Lorraine Gabl and plaintiff, but that the defendant refused to perform the terms of the agreement. The complaint concludes with a prayer for specific performance of the terms of the insurance contract and the alleged agreement relating to the distribution of the proceeds.

On December 19, 1931, the plaintiff and Frank Gabel the insured were married, and on August 1, 1932, the beneficiary was changed from Caroline Gabel to plaintiff. Afterwards, on October 18, 1933, Frank Gabel again changed the beneficiary to Lorraine Gabel, his daughter by a former marriage who was then a minor. For almost a year prior to his death on July 4, 1937, Frank Gabel had lived separate and apart from the plaintiff. On July 10, 1937, plaintiff served a written notice upon the defendant and the latter company that "Frank Gabel was not of sound and disposing mind at the time he changed the name of the beneficiary in said certificate; that undue influence was practiced in order to induce him to make the change". On July 19, 1937, the Probate Court of Cook County appointed Fred Gabel and Anna Frank Guardians of the person and estate of Lorraine Gabel, the insured's daughter. On October 20, 1937, the defendants paid the full amount of the proceeds of the certificate to the Guardians of Lorraine Gabel. The gist of the complaint is that on and after May 10, 1935, Frank Gabel, the insured, suffered from hallucinations; that he voluntarily became a patient of Alexian Brothers Hospital in the city of Chicago and subsequently became a patient at Veterans' Administration Hospital at Ames, Illinois; that after he left the Alexian Brothers Hospital and before he entered the Veterans' Administration Hospital he became a victim of undue influence; that while of unsound mind he was induced to change the beneficiaries; that after the death of the insured the defendant proposed and the plaintiff agreed in writing that the defendant pay "jointly" the insurance money due under the certificate, to Lorraine Gabel and plaintiff, but that the defendant refused to perform the terms of the agreement. The complaint concludes with a prayer for specific performance of the terms of the insurance contract and the alleged agreement relating to the distribution of the proceeds.

Defendant filed two answers and counterclaims. The first counterclaim was in the nature of an interpleader, and the second prayed for the return of the proceeds of the insurance to defendant in the event the court should find that the change of beneficiary by the insured from the plaintiff to his daughter was invalid. The amended answer avers that the defendant had no knowledge of the alleged undue influence, mental incompetency or marital difficulties of the insured; that on October 12, 1936 the insured changed the beneficiary from plaintiff to Lorraine Gabl, his daughter; that due proof was made of the insured's death; that defendant admits it was notified by plaintiff that the change of beneficiary to Lorraine Gabl was the result of undue influence and the insured's mental incompetency; that defendant proposed to make settlement jointly with the plaintiff and Lorraine Gabl, but that the plaintiff refused said proposal and in lieu thereof offered a counterproposal that the defendant divide the proceeds equally between the claimants; that the guardians appointed for the estate and person of the minor, Lorraine Gabl, rejected defendant's proposal to make joint settlement, and demanded the entire proceeds of the insurance; and that the defendant, having been presented with evidence on behalf of the minor, Lorraine Gabl, that Frank Gabl, the insured, was sane when he executed the change of beneficiary, it paid the entire proceeds to the guardians of Lorraine Gabl.

The master in chancery found that plaintiff's evidence failed to show lack of mental capacity of Frank Gabl on October 12, 1936, the date on which the insured requested the change of beneficiary; that no evidence was offered by plaintiff tending to prove that the change of beneficiary was the result of undue influence, and that there was no agreement to divide the proceeds of the insured's certificates equally between the plaintiff and Lorraine Gabl, and recommended that the complaint be dismissed

Lorraine Gahl, and recommended that the complaint be dismissed of the insured's certificate equally between the plaintiff and influence, and that there was no agreement to divide the proceeds prove that the change of beneficiary was the result of undue beneficiary; that no evidence was offered by plaintiff tending to 1936, the date on which the insured requested the change of called to show lack of mental capacity of Frank Gahl on October 12, The master in chambers found that plaintiff's evidence proceeds to the guardians of Lorraine Gahl.

when he executed the change of beneficiary, it paid the entire the minor, Lorraine Gahl, that Frank Gahl, the insured, was sane the defendant, having been presented with evidence on behalf of ment, and demanded the entire proceeds of the insurance; and that Lorraine Gahl, rejected defendant's proposal to make joint settle- that the guardians appointed for the estate and person of the minor, that the defendant divide the proceeds equally between the claimants; refused said proposal and in lieu thereof offered a counterproposal jointly with the plaintiff and Lorraine Gahl, but that the plaintiff mental incompetency; that defendant proposed to make settlement to Lorraine Gahl was the result of undue influence and the insured's against it was notified by plaintiff that the change of beneficiary that the proof was made of the insured's death; that defendant changed the beneficiary from plaintiff to Lorraine Gahl, his daughter; difficulties of the insured; that on October 12, 1936 the insured the alleged undue influence, mental incompetency or marital The amended answer avers that the defendant had no knowledge of by the insured from the plaintiff to his daughter was invalid. in the event the court should find that the change of beneficiary prayed for the return of the proceeds of the insurance to defendant counterclaim was in the nature of an interpleader, and the second The first

for want of equity. The chancellor overruled the plaintiff's exceptions to the master's report and followed his findings and recommendations.

Two questions are presented: first, whether Frank Gabl, the insured, was mentally incompetent to change the beneficiary of his insurance from plaintiff to Lorraine Gabl, his daughter; and, second, whether defendant entered into a valid agreement with plaintiff after the death of Frank Gabl, the insured, which entitled her to any of the proceeds of the insurance.

As to the first question, plaintiff's principal contention is that the master erred in placing greater weight on the testimony of lay witnesses introduced by the defendant than on the testimony of the two psychiatrists introduced by the plaintiff. The plaintiff introduced the testimony of four witnesses, including her own. Dr. Leo J. Latz, called in behalf of plaintiff, testified substantially that Frank Gabl, the insured, was under his care at Alexian Brothers Hospital from November 30, 1936 to December 7, 1936; that he was "suffering from an arteriosclerotic condition of the brain and an alcoholic brain condition with disturbed mental condition," and that in his opinion Frank Gabl was "not capable of understanding the nature of a change of beneficiary of a life insurance policy."

Dr. Walter Zurndorfer, called by the plaintiff, testified that he treated Frank Gabl from June 12, 1936 to June 26, 1936 at Alexian Brothers Hospital; that he subjected him to various tests which disclosed chronic nephritis and decreased function of the kidneys; that Gabl expressed fear that someone was after him; that the "psychosis consisted of constant fear and apprehension that somebody wanted to hurt him"; that Frank Gabl had either developed or had a psychosis and that he was not capable of executing a change in the beneficiary of the insurance certificates in question on

for want of equity. The chancellor overruled the plaintiff's exceptions to the master's report and followed his findings and recommendations.

Two questions are presented: First, whether Frank Gabel, the insured, was mentally incompetent to change the beneficiary of his insurance from plaintiff to her, his daughter; and, second, whether defendant entered into a valid agreement with plaintiff after the death of Frank Gabel, the insured, which entitled her to any of the proceeds of the insurance.

As to the first question, plaintiff's principal contention is that the master erred in placing greater weight on the testimony of lay witnesses introduced by the defendant than on the testimony of the two psychiatrists introduced by the plaintiff. The plaintiff introduced the testimony of four witnesses, including her own. Dr. Leo J. Katz, called in behalf of plaintiff, testified substantially that Frank Gabel, the insured, was under his care at Alexian Brothers Hospital from November 30, 1933 to December 7, 1933; that he was "suffering from an arteriosclerotic condition of the brain and an alcoholic brain condition with disturbed mental condition," and that in his opinion Frank Gabel was "not capable of understanding the nature of a change of beneficiary of a life insurance policy."

Dr. Walter Wundtler, called by the plaintiff, testified that he treated Frank Gabel from June 12, 1936 to June 30, 1936 at Alexian Brothers Hospital; that he subjected him to various tests which disclosed chronic nephritis and decreased function of the kidneys; that Gabel expressed fear that someone was after him; that the "psychosis consisted of constant fear and apprehension that somebody wanted to hurt him"; that Frank Gabel had either developed or had a psychosis and that he was not capable of executing a change in the beneficiary of the insurance certificate in question on

October 12, 1936. The record further discloses that Frank Gabl left the hospital without the permission of Dr. Zurndorfer and that he had Gabl execute a release in favor of the Hospital when he left. On cross examination the witness admitted that Frank Gabl "was capable of understanding the nature of what he was signing." It is undisputed that the clinical records of Alexian Brothers Hospital do not show any reference to psychosis or other mental disturbance of Frank Gabl.

Plaintiff testified that her husband, Frank Gabl, "imagined that people were behind him all the time, that someone was trying to do him out of things, and someone was trying to rob him all the time"; that "he would be all right for a week or ten days and then the same thing would start"; that "from August 12 to August 26, 1936, some times he acted like a normal person, and some times he did not"; and that on August 26, 1936 Frank Gabl, her husband, accompanied by his daughter, Lorraine Gabl, went to live with Ann Funk.

Plaintiff's last witness was Charles J. Russell, whose name appeared as the attorney of record in this cause for the plaintiff. He withdrew his appearance for the purpose of testifying in behalf of his client.

Fourteen witnesses testified for the defendant that Frank Gabl was of sound mind on October 12, 1936; among them were two doctors and four fellow employees of the Register company.

Dr. M. P. Bailey testified by deposition that he had practiced neuropsychiatry for twenty years and was a neuropsychiatrist at the Veterans' Hospital at Montgomery, Alabama, since November 1940; that his previous assignment was at the Veterans' Hospital, Hines, Illinois, from April 1935 to November 1940; that he treated Frank Gabl at the Veterans' Administration Hospital at Hines, Illinois, from March 13, 1937 to March 23, 1937; that when he first examined him

October 12, 1936. The record further discloses that Frank Gabl left the hospital without the permission of Dr. Turner and that he had Gabl execute a release in favor of the Hospital when he left. On cross examination the witness admitted that Frank Gabl "was capable of understanding the nature of what he was signing." It is undisputed that the clinical records of Alexian Brothers Hospital do not show any reference to psychosis or other mental disturbance of Frank Gabl.

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on March 13, 1937, he was mentally confused and unable to transact business; that his mental condition improved gradually, and that at the time of his last examination on May 23, 1937 he had recovered entirely from his mental confusion and was mentally competent; that he considered the disease an acute alcoholic manifestation, as the patient quickly recovered from the acute symptoms and at a final examination on March 23, 1937, "he was not tremulous, had recovered from his mental confusion, and the mental examination showed him to be mentally competent."

Dr. William H. Haines, called as a witness for the defendant, testified that he specializes in nervous and mental diseases and has an office in the Behaviour Clinic of the Criminal Court of Cook County, located at 2600 South California Avenue in the city of Chicago; that he examined the records of Alexian Brothers Hospital; that he is familiar with the methods by which records of patients are kept at various hospitals and has had occasion to examine several thousand; that he based his opinion on the charts, which contain the history the patient gave to the examining intern or doctor at the time, including also the physical and the laboratory examination; that there was no definite information on the charts indicating any mental aberration of the patient at the time; that he did not find anything on the records at the time he examined them to indicate that during the periods mentioned the patient was suffering from delirium tremens; that delirium tremens is an acute condition, usually lasting a few days or a few weeks, "it clears up or the patient dies"; that the individual may have several attacks of the condition, but it is characterized by recovery. In response to a hypothetical question recounting all the symptoms of Frank Gabl as shown by the clinical records of the hospitals as well as his conduct during the period of his employment, the witness stated that in his opinion

on March 13, 1937, he was mentally confused and unable to transact business; that his mental condition improved gradually, and that at the time of his last examination on May 13, 1937 he had recovered entirely from his mental confusion and was mentally competent; that he considered the disease an acute alcoholic delirium, as the patient quickly recovered from the acute symptoms and at a final examination on March 22, 1937, "he was not delirious, had recovered from his mental confusion, and the mental examination showed him to be mentally competent."

Dr. William L. Kaines, called as a witness for the defendant, testified that he specializes in nervous and mental diseases and has an office in the Behaviour Clinic of the Criminal Court of Cook County, located at 2300 South California Avenue in the city of Chicago; that he examined the records of Alexian Brothers Hospital; that he is familiar with the methods by which records of patients are kept at various hospitals and has had occasion to examine several thousand; that he based his opinion on the charts, which contain the history the patient gave to the examining intern or doctor at the time, including also the physical and the laboratory examination; that there was no definite information on the charts indicating any mental aberration of the patient at the time; that he did not find anything on the records at the time he examined them to indicate that during the periods mentioned the patient was suffering from delirium tremens; that delirium tremens is an acute condition, usually lasting a few days or a few weeks, "it clears up or the patient dies"; that the individual may have several attacks of the condition, but it is characterized by recovery. In response to a hypothetical question recounting all the symptoms of Frank Gahl as shown by the clinical records of the hospitals as well as his conduct during the period of his employment, the witness stated that in his opinion

the insured was mentally competent on October 12, 1936.

Defendant's witnesses William J. Volkins, Bertram E. Beach, Alpha B. Spillman, and Ernest Gage, were all fellow employees of Register company during the period of the insured's employment. Volkins testified that he had been in the employ of Register company for 45 years and had charge of filling out forms and other duties relating to the group life insurance of the employees of Register company; that he had seen the insured, Frank Gabl, at least once a week during the 12 years preceding his death; that the insured was present in his office on October 12, 1936, when the change of beneficiary was made, and that in his opinion Frank Gabl was "capable of understanding the nature and effect of the change of beneficiary." The witnesses Beach, Spillman and Gage all testified that they had seen the insured at work every day for varying periods ranging from nine to ten years; that he was a capable workman and appeared to them to be of sound mind. Other witnesses called in behalf of defendant were acquaintances and relatives. They testified in substance that the insured was mentally competent on October 12, 1936 and thereafter until he died on July 4, 1937.

In plaintiff's brief counsel cites the cases of In re Estate of Dombrowski, 321 Ill. App. 300, 53 N. E. (2d) 18, and Britt v. Darnell, 315 Ill. 385. These cases hold in effect that witnesses who are not experts cannot testify upon the question of mental competency unless it appears that they have sufficient acquaintance and opportunity to judge the mental capacity of the person whose competency is questioned. They have no application in the case at bar, since the record discloses that the lay witnesses testifying for defendant had many years of intimate and daily contact with the insured. To relate the testimony of all these witnesses would unduly extend this opinion. Despite the conflicting evidence, we think the testimony bearing on the question of the mental competency of Frank Gabl to change the name of the beneficiary

the insured was mentally competent on October 12, 1936.

Defendant's witnesses William J. Volkins, Bertram E.

Leach, Alpha M. Phillips, and Ernest Gage, were all fellow employees

of Registrar company during the period of the insured's employment.

Volkins testified that he had been in the employ of Registrar company

for 45 years and had charge of filling out forms and other duties

relating to the group life insurance of the employees of Registrar

company; that he had seen the insured, Frank Gadi, at least once a

week during the 12 years preceding his death; that the insured was

present in his office on October 12, 1936, when the change of

beneficiary was made, and that in his opinion Frank Gadi was "capable

of understanding the nature and effect of the change of beneficiary."

The witnesses Beach, Phillips and Gage all testified that they had

seen the insured at work every day for varying periods ranging from

nine to ten years; that he was a capable workman and appeared to

them to be of sound mind. Other witnesses called in behalf of

defendant were acquaintances and relatives. They testified in

substance that the insured was mentally competent on October 12,

1936 and thereafter until he died on July 4, 1937.

In plaintiff's brief counsel cites the cases of In re

Estate of Bonkowski, 291 Ill. App. 300, 85 N. E. (2d) 18, and

Witt v. Dargatzis, 315 Ill. 385. These cases hold in effect that

witnesses who are not experts cannot testify upon the question of

mental competency unless it appears that they have sufficient

acquaintance and opportunity to judge the mental capacity of the

person whose competency is questioned. They have no application in

the case at bar, since the record discloses that the lay witnesses

testifying for defendant had many years of intimate and daily

contact with the insured. To relate the testimony of all these

witnesses would unduly extend this opinion. Despite the conflicting

evidence, we think the testimony bearing on the question of the

mental competency of Frank Gadi to change the name of the beneficiary

preponderates clearly in favor of the defendant, and that the master's findings were amply justified.

Plaintiff's second contention is that certain letters (Plf's Exhibits 22, 24, 25, 27 and 29) appearing in the additional abstract of record constitute the agreement to divide equally the proceeds of the insurance between plaintiff and Lorraine Gabl the beneficiary named in the certificates. This contention is without merit. Plaintiff's Exhibit 29 is the last letter addressed by defendant to plaintiff's attorney relating to the payment of the insurance proceeds. The pertinent portion of this exhibit reads as follows: "The guardian has made claim for full proceeds of these certificates for the beneficiary of record [Lorraine Gabl] and is not disposed or authorized to accept or be a party to any joint settlement with your client." Reasonably construed, this language shows that the guardians of Lorraine Gabl, the insured's daughter, refused to make a division of any of the proceeds with the plaintiff. We have examined all the exhibits carefully and cannot extract an agreement from them. In plaintiff's reply brief, counsel argues that Lorraine Gabl "never had a voice in the matter so that she could make a decision or recommendation." That question, as well as the conduct of her guardians, is not before us. We have not discussed the other points presented in plaintiff's briefs, some of which are outside of the record, since it has not been necessary for disposition of this cause.

For the reasons stated, the order of the chancellor dismissing the bill of complaint for want of equity is affirmed.

AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

preponderates clearly in favor of the defendant, and that the

master's findings were amply justified.

Plaintiff's second contention is that certain letters

(Pl's exhibits 22, 24, 25, 27 and 28) appearing in the additional

abstract of record constitutes the agreement to divide equally the

proceeds of the insurance between plaintiff and Lorraine and the

beneficiary named in the certificate. This contention is without

merit. Plaintiff's Exhibit 28 is the last letter addressed by

defendant to plaintiff's attorney relating to the payment of the

insurance proceeds. The pertinent portion of this exhibit reads as

follows: "The guardian has made claim for full proceeds of these

certificates for the beneficiary of record [Lorraine Gahl] and is not

disposed or authorized to accept or be a party to any joint settlement

with your client." Reasonably construed, this language shows that

the guardians of Lorraine Gahl, the insured's daughter, refused to

make a division of any of the proceeds with the plaintiff. We have

examined all the exhibits carefully and cannot extract an agreement

from them. In plaintiff's reply brief, counsel argues that Lorraine

Gahl "never had a voice in the matter so that she could make a

decision or recommendation." That question, as well as the conduct

of her guardians, is not before us. We have not discussed the other

points presented in plaintiff's briefs, some of which are outside

of the record, since it has not been necessary for discussion of

this case.

For the reasons stated, the order of the chancellor dis-

missing the bill of complaint for want of equity is affirmed.

AFFIRMED.

KILLY, P. J. AND BUNN, J. CONCUR.

43204

LeROY PAUL, alias LeROY POLLOKOWSKI,

Appellant,

v.

SAMUEL A. STRITCH, D.D., Archbishop
of The Roman Catholic Church of
Chicago, a corporate sole, and
LORETTA PAUL, alias LORETTA
POLLOKOWSKI,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

328 I.A. 129

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

LeRoy Paul filed his amended complaint for an accounting against his sister Loretta Paul and "Samuel A. Stritch, D. D., Archbishop of the Roman Catholic Church of Chicago, a corporate sole" and which defendant filed an appearance as "The Catholic Bishop of Chicago, a corporation sole," hereinafter called "corporation sole." The chancellor sustained the corporation sole's motion to strike and dismissed the amended complaint. Plaintiff appeals.

The gist of the amended complaint is that the plaintiff's parents, Fred Paul and Margaret Paul, his wife, owned certain real estate in the City of Chicago which they had purchased from one Mary Elser; that on January 12, 1929 Margaret Paul, plaintiff's mother, died; that on February 16, 1929 Fred Paul, plaintiff's father sold the real estate in question for \$25,000 at the behest of Benjamin Elser the husband of Mary Elser; that afterwards Fred Paul and Benjamin Elser orally agreed to create a trust for plaintiff and his sister which provided that \$20,000 was to be held in trust for them until they attained their majorities, when they were to receive \$5,000 each, and the remainder was to be expended for their board, lodging and tuition during their minority; that on December 28, 1929 plaintiff's father executed a trust agreement designating the Chicago Title and Trust Company as trustee, incorporating the terms of the oral agreement; that on or about January 1, 1941 plaintiff's father, Fred Paul, learned that Elser, contrary to terms

LEROY PAUL, alias LEON POLONOWSKI,

Appellant,

v.

SAMUEL A. STRITCH, D.D., Archbishop
of the Roman Catholic Church of
Chicago, a corporate sole, and
LORETTA PAUL, alias LORETTA
POLONOWSKI,

Appellees.

323 I.A. 123

MR. JUSTICE LEE, LEAVING THE OPINION OF THE COURT,

LEROY PAUL filed his amended complaint for an accounting

against his sister Loretta Paul and "Samuel A. Stritch, D.D.,

Archbishop of the Roman Catholic Church of Chicago, a corporate sole,"

and which defendant filed an appearance as "The Catholic Bishop of

Chicago, a corporation sole," hereinafter called "corporation sole."

The chancellor sustained the corporation sole's motion to strike

and dismissed the amended complaint. Plaintiff appeals.

The gist of the amended complaint is that the plaintiff's

parents, Fred Paul and Margaret Paul, his wife, owned certain real

estate in the City of Chicago which they had purchased from one Mary

Eiser; that on January 12, 1929 Margaret Paul, plaintiff's mother,

died; that on February 12, 1929 Fred Paul, plaintiff's father sold

the real estate in question for \$25,000 at the behest of Benjamin

Eiser the husband of Mary Eiser; that afterwards Fred Paul and

Benjamin Eiser orally agreed to create a trust for plaintiff and

his sister which provided that \$20,000 was to be held in trust for

them until they attained their majorities, when they were to

receive \$5,000 each, and the remainder was to be expended for their

board, lodging and tuition during their minority; that on December

28, 1929 plaintiff's father executed a trust agreement designating

the Chicago Title and Trust Company as trustee, incorporating the

terms of the oral agreement; that on or about January 1, 1931

plaintiff's father, Fred Paul, learned that Eiser, contrary to terms

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

of the alleged oral agreement, had fraudulently deposited the money with the corporation sole without revealing his agency to it; that certain moneys were advanced by the corporation sole to plaintiff for board and lodging and in the form of cash. The amended bill concluded with a prayer for a judgment against the corporation sole for \$5,000 "plus any income received therefrom" and an accounting of the other \$5,000. Loretta Paul, plaintiff's sister, has not filed an appearance.

The amended bill is based upon the theory that the plaintiff's claim is due under an oral agreement between his father, Fred Paul and Elser. Defendant contends that it fails to state a cause of action predicated liability against it. Plaintiff does not seek to set aside the trust agreement between Benjamin Elser and the corporation sole. Elser is not made a party to the proceeding though the fraud, if any, was committed by Elser. Although plaintiff's father knew of the trust agreement between Elser and the corporation sole in January, 1941, no action was taken by him or his legal representative to disaffirm it. So far as appears from the record, the corporation sole has complied with the terms of the trust agreement between it and Elser. It does not appear that the \$20,000 deposited with the corporation sole represented the proceeds of the sale of the real estate owned by plaintiff's father.

In effect plaintiff is endeavoring to modify the terms of a written agreement to conform to the terms of an alleged oral agreement between Elser and the plaintiff's father, to which the corporation sole was not a party. From the allegations of the bill it does not appear that the corporation sole had any knowledge of the alleged oral contract, nor is it charged with participating in the fraud.

Taking the allegations of the amended complaint as true,

of the alleged oral agreement, had fraudulently deposited the money with the corporation sole without revealing his agency to it; that certain moneys were advanced by the corporation sole to plaintiff for board and lodging and in the form of cash. The amended bill concluded with a prayer for a judgment against the corporation sole for \$5,000 "plus any income received therefrom" and an accounting of the other \$5,000. Forster Paul, plaintiff's sister, has not filed an appearance.

The amended bill is based upon the theory that the plain-

tiff's claim is one under an oral agreement between his father, Fred Paul and Elser. Defendant contends that it fails to state a cause of action presenting liability against it. Plaintiff does not seek to set aside the trust agreement between Benjamin Elser and the corporation sole. Elser is not made a party to the proceeding though the fraud, if any, was committed by Elser. Although plaintiff's father knew of the trust agreement between Elser and the corporation sole in January, 1941, no action was taken by him or his legal representative to dissolve it. So far as appears from the record, the corporation sole has complied with the terms of the trust agreement between it and Elser. It does not appear that the \$5,000 deposited with the corporation sole represented the proceeds of the sale of the real estate owned by plaintiff's father.

In effect plaintiff is endeavoring to modify the terms of a written agreement to conform to the terms of an alleged oral agreement between Elser and the plaintiff's father, to which the corporation sole was not a party. From the allegations of the bill it does not appear that the corporation sole had any knowledge of the alleged oral contract, nor is it charged with participating in the fraud. Taking the allegations of the amended complaint as true,

as we must, in considering defendant's motion, we think plaintiff fails to state a cause of action against the corporation sole.

For the reasons given, the order, sustaining defendant's motion to strike and dismissing the plaintiff's amended complaint, is affirmed.

AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

as we must, in considering defendant's motion, we think plaintiff fails to state a cause of action against the corporation sole. For the reasons given, the order, sustaining defendant's motion to strike and dismissing the plaintiff's amended complaint, is affirmed.

AFFIRMED.

KILEY, P. J. AND BURKE, J. CONCUR.

43454

LUDMILLA STAPEL,
(Plaintiff) Appellant,

v.

JULIUS KANWISCHER et al.,
Defendants.

JULIUS KANWISCHER,
(Defendant) Appellee.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

328 I.A. 130

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of forcible entry and detainer against defendants before a justice of the peace to obtain possession of certain real estate which she had purchased and which was occupied by defendants. The justice entered judgment for defendants. Upon appeal to the Circuit court there was a trial de novo before the court without a jury and a finding and judgment in favor of defendants. Plaintiff appeals. Julius Kanwischer, defendant, is the only appellee who entered an appearance and filed a brief in the cause.

Upon the trial defendants admitted that plaintiff was the owner of the premises in question, commonly known as 1354 Brown street, Des Plaines, Illinois, which she purchased from Olivia K. Moldenhauer, the widow of Dr. William J. Moldenhauer, on February 7, 1944. After plaintiff purchased the property she obtained a certificate from the Office of Price Administration authorizing her to evict the tenant of the premises provided the action to evict was not commenced sooner than three months after July 13, 1944. Plaintiff caused a written notice to be served upon defendant Julius Kanwischer informing him that his tenancy would terminate October 31, 1944, and demanding that he quit his occupation

1881.A.130

1. The first part of the document is a letter from the President of the United States to the President of the Senate, dated January 1, 1877. The letter is signed by Rutherford B. Hayes and is addressed to Charles Schreyer. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States.

JULIUS ROSENBERG
(Defendant) - the same.

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

plaintiff brought an action of forcible entry and
detainer against defendants before a justice of the peace to
obtain possession of certain real estate which she had par-
chased and which was occupied by defendants. The justice
entered judgment for defendant. Upon appeal to the Circuit
court there was a trial de novo before the court without a
jury and a finding and judgment in favor of defendant. Plain-
tiff appeals. Julius Kautischer, defendant, is the only
appellee who entered an appearance and filed a brief in the
cause.

Upon the trial defendants admitted that plaintiff was the owner of the premises in question, commonly known as 1114 Brown Street, Los Angeles, Illinois, which she purchased from Olivia E. Goldsmid, the widow of Dr. William J. Goldsmid, on February 7, 1944. After plaintiff purchased the property she obtained a certificate from the Office of Price Administration authorizing her to evict the tenant of the premises provided the action to evict was not commenced sooner than three months after July 13, 1944. Plaintiff caused a written notice to be served upon defendant Julius Kautzsch informing him that his tenancy would terminate October 11, 1944, and demanding that he quit his occupation

of the premises as plaintiff wished to occupy the same as her home. Upon his failure to quit possession the instant proceedings were started.

The sole defense to the action was that defendant Julius Kanwischer had a better right to the possession of the premises than plaintiff by virtue of a certain written lease, dated December 20, 1935, and he was allowed to introduce in evidence, over the objection of plaintiff, what purported to be a lease for the premises. The term of the lease commenced January 1, 1936, and terminated January 1, 1947. In the body of the lease the lesser is described as "Minnie Moldenhauer agent for William J. Moldenhauer," and the lease is signed, "Minnie Moldenhauer, Agent for Wm. J. Moldenhauer (Seal)." Julius Kanwischer, defendant, testified that he occupied the premises under that lease since its execution and that he had paid the rent to Minnie Moldenhauer for eight years; then to Mrs. Stapel for six months; that he and Minnie Moldenhauer signed the lease. Minnie Moldenhauer, called by defendants, testified that she was a sister of Dr. William J. Moldenhauer, the former owner of the property, who died June 30, 1942; that she wrote the said lease in duplicate and signed it, she thinks, on the date that it bears; that she gave one copy to Julius Kanwischer and she kept the other copy; that after executing it she placed her copy in her safety deposit box, where it has been ever since; that she did not keep all of Dr. Moldenhauer's papers in that box; that after his death she gave some of his papers to his widow, Olivia Moldenhauer, and the remainder to the latter's attorney, Mr. Rosin; that she did not turn over the lease to either of them and that she still has it in her box. At the conclusion of her testimony plaintiff moved to exclude the lease, upon a number of grounds,

of the premises as plaintiff wished to occupy the same as her home. Upon his failure to quit possession the instant proceedings were started.

The sole defense to the action was that defendant Julius Kautischer had a better right to the possession of the premises than plaintiff by virtue of a certain written lease, dated December 30, 1937, and he was allowed to introduce in evidence, over the objection of plaintiff, what purported to be a lease for the premises. The term of the lease commenced January 1, 1936, and terminated January 1, 1947. In the body of the lease the lessor is described as "Eddie Goldhammer agent for William J. Goldhammer," and the lease is signed, "Eddie Goldhammer, agent for W. J. Goldhammer (Seal)." Julius Kautischer, defendant, testified that he occupied the premises under that lease since its execution and that he had paid the rent to Eddie Goldhammer for eight years; then to Mr. Stoppel for six months; that he and Eddie Goldhammer signed the lease. Eddie Goldhammer, called by defendant, testified that she was a sister of Dr. William J. Goldhammer, the former owner of the property, who died June 30, 1942; that she wrote the said lease in duplicate and signed it; she thinks, on the date that it bears; that she gave one copy to Julius Kautischer and she kept the other copy; that after executing it she placed her copy in her safety deposit box, where it has been ever since; that she did not keep all of Dr. Goldhammer's papers in that box; that after his death she gave some of his papers to his widow, Olivia Goldhammer, and the remainder to the latter's attorney, Mr. Roskin; that she did not turn over the lease to either of them and that she still has it in her box. At the conclusion of her testimony plaintiff moved to exclude the lease, upon a number of grounds,

but for the purposes of this appeal we need notice one only, viz., that there was no written proof of the agency of Minnie Moldenhauer to sign the lease. The trial court refused to exclude the lease.

It is the law that a party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the agent acted. (See Foster v. Graf, 287 Ill. 559, 562.) The Statute of Frauds of this State (ch. 59, sec. 2, Ill. Rev. Stat. 1945) provides:

"No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party. * * *"

"Where the Statute of Frauds requires that the memorandum of a contract for the transfer of an estate or interest in lands, etc. must be signed by the party to be charged, or by someone by him lawfully authorized in writing, the authority must be conferred by writing, and, in the absence of a ratification by the principal, a memorandum of a contract executed by an agent acting under parol authority is void and of no effect." (27 A. L. R. 607.)

In Rogan v. Arnold, 233 Ill. 19, 21, it was held that to bind a principal to a lease, under seal, signed by another as agent of the principal, there must be evidence that the agent was authorized in writing to execute it. Counsel for defendants rely upon the doctrine of ratification. The general rule is that when the adoption of some form of procedure is necessary to confer authority in the first instance there can be no valid

but for the purpose of this appeal we need notice only, viz., that there was no written proof of the agency of Whittle. Moldenauer to sign the lease. The trial court refused to exclude the lease.

It is the law that a party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the agent acted. (See Foster v. Gray, 287 Ill. 559, 562.) The Statute of Wills of this State (Ill. Stat., 1945) provides:

"No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized in writing, signed by such party. * * *

"Under the Statute of Wills requires that the memorandum of a contract for the transfer of an estate or interest in lands, etc., must be signed by the party to be charged, or by someone by him lawfully authorized in writing, the authority must be conferred by writing, and, in the absence of a ratification by the principal, a memorandum of a contract executed by an agent acting under parol authority is void and of no effect." (27 A.

I. 2. 607.)

In Bolan v. Bolan, 233 Ill. 19, 21, it was held that to bind a principal to a lease, under seal, signed by another as agent of the principal, there must be evidence that the agent was authorized in writing to execute it. Counsel for defendants rely upon the doctrine of ratification. The general rule is that when the adoption of some form of procedure is necessary to confer authority in the first instance there can be no valid

ratification except in the same manner. (See 2 C. J. S. pp. 1088, 1089.) Minnie Moldenhauer did not claim that she had written authority from Dr. Moldenhauer to sign the lease. Indeed, she did not claim that she had oral authority to do so. Her testimony shows that she never delivered the lease to Dr. Moldenhauer and it fails to show that she ever spoke to him about the lease. She did not even testify that when Julius Kanwischer paid her the rent she gave the same to Dr. Moldenhauer, but, if it be assumed that she did, nevertheless, there is no testimony to show that when Dr. Moldenhauer received the rent from her he knew that he was receiving it under the lease. Neither Olivia Moldenhauer nor plaintiff ever saw or heard of the lease. The trial court and defendants' attorney were of the opinion that the lease itself, coupled with the evidence of Julius Kanwischer that after the execution of the lease he "paid rent to Miss Moldenhauer for eight years" and that since plaintiff acquired the property "I have paid rent to Mrs. Stapel, the plaintiff in this case," proved a ratification of the lease and made out a complete defense to the action. The trial court admitted the lease in evidence upon that theory, disregarding the undisputed evidence that Olivia Moldenhauer and plaintiff never saw or heard of the lease when they accepted rent for the premises, that Dr. Moldenhauer never saw the lease, and there is no evidence that he ever heard of it. If the court's theory of the law were sound it would be impossible for a principal to escape responsibility for any unauthorized act of his agent. Kanwischer, defendant, in his brief, makes a feeble claim that plaintiff "recognized the lease by accepting rent from him [Kanwischer]." Olivia Moldenhauer testified that she never knew that there was such a lease, and there is no proof to rebut that statement. Plaintiff offered to prove by a number of witnesses that before she bought the property Julius Moldenhauer

ratification except in the same manner. (See S. C. L. S. pp. 102, 103.) (MRS. GOLDMAN did not claim that she had written authority from Dr. Goldman to sign the lease. Indeed, she did not claim that she had oral authority to do so. Her testimony shows that she never delivered the lease to Dr. Goldman and it fails to show that she ever spoke to him about the lease. She did not even testify that when Julius Goldman paid her the rent she gave the same to Dr. Goldman, but, if it be assumed that she did, nevertheless, there is no testimony to show that when Dr. Goldman received the rent from her he knew that he was receiving it under the lease. Neither Olivia Goldman nor plaintiff ever saw or heard of the lease. The trial court and defendant's attorney were of opinion that the lease itself, coupled with the evidence of Julius Goldman that after the execution of the lease he "paid rent to Mrs. Goldman for eight years" and that since plaintiff acquired the property "I have paid rent to Mrs. Stabel, the plaintiff in this case," proved a ratification of the lease and made out a complete defense to the action. The trial court admitted the lease in evidence upon that theory, disregarding the undisputed evidence that Olivia Goldman and plaintiff never saw or heard of the lease when they accepted rent for the premises, that Dr. Goldman never saw the lease, and there is no evidence that he ever heard of it. If the court's theory of the law were sound it would be impossible for a principal to escape responsibility for any unauthorized act of his agent. Goldman, defendant, in his brief, makes a feeble claim that plaintiff "recognized the lease by accepting rent from him [Goldman]". Olivia Goldman testified that she never knew that there was such a lease, and there is no proof to rebut that statement. Plaintiff offered to prove by a number of witnesses that before she bought the property Julius Goldman

stated to her that there was no lease upon the premises, but the court, upon objection by defendants, held that such evidence would be incompetent. Maria Gross testified that a month before plaintiff bought the property, the witness, plaintiff, Julius Kanwischer and Minnie Moldenhauer were in the home of the latter, and in a conversation that took place there Julius Kanwischer and Minnie Moldenhauer both stated there was no lease upon the premises. This evidence, upon motion of defendants, was stricken. Plaintiff also offered to prove that in March, 1944, Julius Kanwischer asked her if she would execute a lease for him for the property so that he could be a tenant under a written lease; that before she bought the property she asked Julius Kanwischer and also Minnie Moldenhauer if there was a written lease upon the premises and that they both stated that there was not. Upon objection of defendants the court refused to allow the evidence. The trial court erred in refusing to admit the evidence offered by plaintiff, erred in admitting the alleged lease in evidence, and further erred in not entering judgment for plaintiff.

Plaintiff strenuously contended in the trial court, and contends here, that the lease is a fraudulent one; that it was drafted and signed after plaintiff became the owner of the real estate and after she refused to give Julius Kanwischer a lease to the premises, and she offered evidence in support of her contention. It seems hardly necessary to state that if the lease offered by defendant is a fraudulent one the entire defense would fall. The trial court seemed to regard the offered evidence as of no materiality, and, without any justification for so doing, he treated plaintiff's young attorney harshly when the latter sought to introduce proper evidence in support of the contention that the lease was a fraudulent one. In spite of the fact that the court improperly excluded most of the said

stated to her that there was no lease upon the premises, but the court, upon objection by defendants, held that such evidence would be incompetent. This cross testified that a month before plaintiff bought the property, the witness, plaintiff, Julius Kewisch and Annie Goldhammer were in the home of the latter, and in a conversation that took place there Julius Kewisch and Annie Goldhammer both stated there was no lease upon the premises. This evidence, in connection of defendants, was objection. Plaintiff also offered to prove that in March, 1944, Julius Kewisch stated that if she would execute a lease for him for the property so that he could be a tenant under a written lease; that before she bought the property she asked Julius Kewisch and also Annie Goldhammer if there was a written lease upon the premises and that they both stated that there was not. Upon objection of defendants the court refused to allow the evidence. The trial court erred in refusing to admit the evidence offered by plaintiff, erred in admitting the alleged lease in evidence, and further erred in not entering judgment for plaintiff.

Plaintiff strenuously contended in the trial court, and contends here, that the lease is a fraudulent one; that it was drafted and signed after plaintiff became the owner of the real estate and after she refused to give Julius Kewisch a lease to the premises, and she offered evidence in support of her contention. It seems hardly necessary to state that all the facts offered by defendant is a fraudulent one the entire defense would fail. The trial court seemed to regard the offered evidence as of no materiality, and, without any justification for so doing, he treated plaintiff's young attorney harshly when the latter sought to introduce proper evidence in support of the contention that the lease was a fraudulent one. In spite of the fact that the court improperly excluded most of the said

evidence offered by plaintiff, there are certain facts in the record that tend to support plaintiff's contention. Olivia K. Moldenhauer, the widow of William J. Moldenhauer, testified that she never heard of the lease although Dr. Moldenhauer died June 30, 1942, and she owned the premises until February 7, 1944, when she deeded them to plaintiff. Minnie Moldenhauer testified that she kept her copy of the lease in her safety deposit box from the time of the execution of the same in 1935 until the time of the trial, although she delivered the other documents that she had in her possession that belonged to Dr. Moldenhauer to Olivia K. Moldenhauer or her attorney, but that she did not deliver the lease to either of them. The lease is an unusual one. It purports to give Julius Kanwischer an eleven year lease of a residence in Des Plaines. There is evidence that Olivia K. Moldenhauer, after the death of her husband, took away from Minnie Moldenhauer the management of certain of the real estate, including the premises in question, that had belonged to him. The evidence warrants the conclusion that plaintiff would not have bought the property if she had known that there was a lease upon it. If the alleged lease was not a fraudulent one, why was its existence kept a secret for many years? Why was it not turned over to Olivia Moldenhauer when her husband, Dr. Moldenhauer, died and she became the owner of the property? All of the evidence offered by plaintiff that tended to support her claim that the lease was a fraudulent one was competent, and should have been admitted. To some of the evidence offered the court ruled that a proper foundation had not been laid for the evidence. We take it that the court was of the opinion that impeaching questions would have to be first put to Kanwischer before the offered evidence would be competent. The rule that the trial court had in mind does not apply to the parties to a suit. The offered evidence was competent against Kanwischer,

evidence offered by plaintiff, there are certain facts in the record that tend to support plaintiff's contention. Olivia K. Goldhammer, the widow of William J. Goldhammer, testified that she never heard of the lease although Dr. Goldhammer died June 30, 1942, and she owned the premises until February 1944, when he bequeathed them to plaintiff. Elsie Goldhammer testified that she kept her copy of the lease in her safety deposit box from the time of the execution of the same in 1935 until the time of the trial, although she delivered the other documents that she had in her possession that belonged to Dr. Goldhammer to Olivia K. Goldhammer or her attorney, but that she did not deliver the lease to either of them. The lease is an unusual one. It purports to give Julius Kammacher an eleven year lease of a residence in Des Moines. There is evidence that Olivia K. Goldhammer, after the death of her husband, took away from Elsie Goldhammer the management of certain of the real estate, including the premises in question, that had belonged to him. The evidence warrants the conclusion that plaintiff would not have bought the property if she had known that there was a lease upon it. If the alleged lease was not a fraudulent one, why was its existence kept a secret for many years? Why was it not turned over to Olivia Goldhammer when her husband, Dr. Goldhammer, died and she became the owner of the property? All of the evidence offered by plaintiff that tended to support her claim that the lease was a fraudulent one was competent, and should have been admitted. To some of the evidence offered the court ruled that a proper foundation had not been laid for the evidence. We take it that the court was of the opinion that impeaching questions could have to be first put to Kammacher before the offered evidence would be competent. The rule that the trial court had in mind does not apply to the parties to a suit. The offered evidence was competent against Kammacher.

defendant, as in the nature of admissions against interest. However, in view of the conclusion that we have reached upon the first point raised by plaintiff, it is unnecessary for us to decide the question as to whether there is sufficient evidence in the record to warrant a finding that the lease is a fraudulent one, although we feel impelled to state that it is subject to grave suspicion. Defendants offered no legal defense to plaintiff's action and the judgment of the Circuit court of Cook county is reversed and the cause is remanded with directions to enter a judgment in favor of plaintiff.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

defendant, as in the nature of admissions against the rest.
However, in view of the conclusion that we have reached upon
the first point raised by plaintiff, it is unnecessary for us
to decide the question as to whether there is sufficient
evidence in the record to warrant a finding that the lease
is a fraudulent one, although we feel impelled to state that
it is subject to grave suspicion. Defendants offered no legal
defense to plaintiff's action and the judgment of the Circuit
court of Cook county is reversed and the cause is remanded
with directions to enter a judgment in favor of plaintiff.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, J. J., and Sullivan, J., concur.

43336

WILLIAM T. DICKERMAN,
Appellee,

v.

AMY V. JONES,
Appellant.

166
A
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

329 I.A. 131

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, William T. Dickerman, before a justice of the peace on October 22, 1943 to recover for legal services rendered by him to defendant, Amy V. Jones, in a divorce proceeding wherein a decree was entered in her favor on May 12, 1932. The justice of the peace entered judgment in favor of Attorney Dickerman and against Amy V. Jones for \$329.75. Defendant appealed from said judgment and on October 25, 1944, after a trial de novo before the court without a jury, the circuit court also entered judgment for \$329.75 in favor of plaintiff and against defendant, from which judgment defendant prosecutes this appeal.

The evidence in the record consists solely of the undisputed and unimpeached testimony of Attorney Dickerman and numerous documents introduced by him. Amy V. Jones did not testify nor was any evidence offered in her behalf in the instant case.

In September, 1931 Amy V. Jones engaged Attorney Dickerman to prosecute her suit for divorce against her husband, Dr. Horry M. Jones. She said to Dickerman that she had no money to pay him attorney's fees at that time. He told her, "You know the courts never allow a lawyer a reasonable fee in these divorce suits, and I don't take them unless I can see my way to get paid for my time * * * I want you to sign the necessary papers, to make up a

43336

WILLIAM T. DICKERMAN, Appellee,

v.

AMY V. JONES, Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

3221A.131

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, William T.

Dickerman, before a Justice of the Peace on October 22,

1943 to recover for legal services rendered by him to

defendant, Amy V. Jones, in a divorce proceeding wherein

a decree was entered in her favor on May 12, 1932. The

Justice of the Peace entered judgment in favor of Attorney

Dickerman and against Amy V. Jones for \$329.75. Defendant

appealed from said judgment and on October 25, 1944, after

a trial de novo before the court without a jury, the

circuit court also entered judgment for \$329.75 in favor

of plaintiff and against defendant, from which judgment

defendant prosecutes this appeal.

The evidence in the record consists solely of the

undisputed and unimpeached testimony of Attorney Dickerman

and numerous documents introduced by him. Amy V. Jones

did not testify nor was any evidence offered in her behalf

in the instant case.

In September, 1931 Amy V. Jones engaged Attorney

Dickerman to prosecute her suit for divorce against her

husband, Dr. Henry M. Jones. She said to Dickerman that she

had no money to pay him attorney's fees at that time. He

told her, "You know the courts never allow a lawyer a

reasonable fee in these divorce suits, and I don't take

them unless I can see my way to get paid for my time * * *

I want you to sign the necessary papers, to make up a

reasonable fee for what the Court does not grant me." She agreed to his proposition. The divorce case was contested, numerous hearings were had before a master and a decree was entered on May 12, 1932 granting Amy V. Jones a divorce and the custody of her two children. The decree directed that Dr. Jones pay Amy V. Jones \$25 per week for the support of herself and the two children and it also directed that he pay her \$1100 at the rate of \$25 per month commencing August 1, 1933, \$200 at the rate of \$25 per month commencing November 1, 1932 for necessary surgical and hospital expenses theretofore incurred by her and \$175 additional solicitor's fees at the rate of \$25 per month.

As the result of negotiations between Attorney Dickerman and Amy V. Jones after the entry of the decree of divorce they agreed that \$500 was a reasonable fee for his services in prosecuting her divorce action to decree. The terms of this agreement were incorporated in the following instrument executed by Amy V. Jones on July 5, 1932:

"STATE OF ILLINOIS)
COUNTY OF COOK) SS.

IN THE CIRCUIT COURT OF COOK COUNTY

Amy V. Jones)
vs.) No. B228665
Horry M. Jones)

Whereas, the undersigned, complainant in the above entitled cause, retained W. T. Dickerman, 9206 Commercial Avenue, Chicago, Illinois, as her attorney to file a bill for divorce and for other relief, which bill was filed in the above entitled cause and prosecuted to a decree, which was entered May 12, 1932; and,

Whereas, the said W. T. Dickerman is entitled to receive a reasonable fee for services rendered up to the time of having said decree entered on May 12, 1932, and a reasonable fee for the services rendered by said W. T. Dickerman to the undersigned up to and including the entry of the decree on May 12, 1932, is the sum of Five Hundred (\$500.00) Dollars, and the undersigned is without means to pay the balance due said W. T. Dickerman; and,

reasonable fee for what the Court does not grant me." She agreed to his proposition. The divorce case was contested, numerous hearings were had before a master and a decree was entered on May 12, 1932 granting Amy V. Jones a divorce and the custody of her two children. The decree directed that Dr. Jones pay Amy V. Jones \$25 per week for the support of herself and the two children and it also directed that he pay her \$100 at the rate of \$25 per month commencing August 1, 1932, \$200 at the rate of \$25 per month commencing November 1, 1932 for necessary surgical and hospital expenses thereto-fore incurred by her and \$175 additional solicitor's fees at the rate of \$25 per month.

As the result of negotiations between Attorney Dickerman and Amy V. Jones after the entry of the decree of divorce they agreed that \$100 was a reasonable fee for his services in prosecuting her divorce action to decree. The terms of this agreement were incorporated in the following instrument executed by Amy V. Jones on July 5, 1932:

"STATE OF ILLINOIS)
COUNTY OF COOK) ss.

IN THE CIRCUIT COURT OF COOK COUNTY

Amy V. Jones)
vs.)
Harry M. Jones)
No. B23866)

Whereas, the undersigned, complainant in the above entitled case, retained W. T. Dickerman, 2206 Commercial Avenue, Chicago, Illinois, as her attorney to file a bill for divorce and for other relief, which bill was filed in the above entitled cause and prosecuted to a decree, which was entered May 12, 1932; and

Whereas, the said W. T. Dickerman is entitled to receive a reasonable fee for services rendered up to the time of having said decree entered on May 12, 1932, and a reasonable fee for the services rendered by said W. T. Dickerman to the undersigned up to and including the entry of the decree on May 12, 1932, in the sum of Five Hundred (\$500.00) Dollars, and the undersigned is without means to pay the balance due said W. T. Dickerman; and,

Whereas, by reason of an order entered in the above entitled cause on October 2, 1931, the defendant, Horry M. Jones paid to W. T. Dickerman the sum of Seventy-five \$75.00 Dollars on account of attorney's fees for the undersigned, and the decree entered in the above entitled cause on May 12, 1932, provides that said Horry M. Jones shall pay to the undersigned the further sum of One Hundred and Seventy-five (\$175.00) Dollars as additional solicitor's fees payable \$25.00 in 30 days and \$25.00 every 30 days thereafter and the whole sum of said \$175.00 to be paid within seven months from the entry of said decree; and,

Whereas, the undersigned desires to secure the payment of the further sum of Two Hundred and Fifty (\$250.00) Dollars to said W. T. Dickerman, and not having the present means to pay the same;

Therefore, in consideration of the premises, and the services rendered by said W. T. Dickerman, I do hereby sell, assign, transfer and set over to W. T. Dickerman, his heirs, executors, administrators, and assigns, all my right, title and interest in and to the sum of Two Hundred and Fifty (\$250.00) Dollars payable to me as provided in said decree entered May 12, 1932, in the above entitled cause, out of the \$200.00 expenses incurred on my behalf for surgical and hospital treatment and care and out of the sum of \$1,100.00 directed to be paid to me in cash by the defendant, Horry M. Jones, and morefully set forth on pages 7 and 8 of said decree; and I further direct and order that the defendant, Horry M. Jones, to pay direct to W. T. Dickerman the \$175.00 additional attorney's fees provided for in said decree, and upon the said W. T. Dickerman receiving from the said Horry M. Jones the said sum of \$250.00 and \$175.00, all other sums payable under said decree shall be paid direct to me, and no part of the alimony allowed in said decree shall be used to pay the attorney's fees herein provided for.

Said W. T. Dickerman, his heirs, executors, administrators or assigns, are hereby authorized and empowered to take all legal measures which may be proper or necessary for the complete recovery of the money hereby assigned."

It will be noted that in this instrument Amy V. Jones not only made an assignment to Attorney Dickerman of \$250 of the monies payable to her by Dr. Jones under the terms of her decree of divorce but that she acknowledged her indebtedness to Dickerman in that amount as the balance due him for his services up to and including the date of the entry of said decree.

On the same day that Amy V. Jones executed the foregoing instrument she again retained Attorney Dickerman to defend her decree of divorce on an appeal therefrom by Dr.

Whereas, by reason of an order entered in the above entitled case on October 2, 1931, the defendant, Harry M. Jones paid to W. T. Dickman the sum of seventy-five (\$75.00) dollars on account of attorney's fees for the undersigned, and the same entered in the above entitled case on May 12, 1932, provided that said Harry M. Jones shall pay to the undersigned the further sum of one hundred and seventy-five (\$175.00) dollars as additional solicitor's fees payable \$25.00 in 30 days and \$25.00 every 30 days thereafter and the whole sum of said \$175.00 to be paid within seven months from the entry of said decree; and,

Whereas, the undersigned desires to secure the payment of the further sum of two hundred and fifty (\$250.00) dollars to said W. T. Dickman, and not having the present means to pay the same;

The undersigned, in consideration of the premises, and the services rendered by said W. T. Dickman, I do hereby sell, assign, transfer and set over to W. T. Dickman, his heirs, executors, administrators, and assigns, all my right, title and interest in and to the sum of two hundred and fifty (\$250.00) dollars payable to me as provided in said decree entered May 12, 1932, in the above entitled case, out of the \$250.00 expenses incurred on my behalf for a legal and hospital treatment and care and out of the sum of \$1,100.00 directed to be paid to me in cash by the defendant, Harry M. Jones, and more fully set forth on pages 7 and 8 of said decree; and I further direct and order that the defendant, Harry M. Jones, to pay direct to W. T. Dickman the \$175.00 additional attorney's fees provided for in said decree, and upon the said W. T. Dickman receiving from the said Harry M. Jones the said sum of \$250.00 and \$175.00, all other sums payable under said decree shall be paid direct to me, and no part of the alimony allowed in said decree shall be used to pay the attorney's fees herein provided for.

Said W. T. Dickman, his heirs, executors, administrators or assigns, are hereby authorized and empowered to take all legal measures which may be proper or necessary for the complete recovery of the money hereby assigned."

It will be noted that in this instrument Mrs. V. Jones not only made an assignment to Attorney Dickman of \$250 of the monies payable to her by Dr. Jones under the terms of her decree of divorce but that she acknowledged her indebtedness to that man in that amount as the balance due him for his services up to and including the date of the entry of said decree.

On the same day that Mrs. V. Jones executed the foregoing instrument she again retained Attorney Dickman to defend her decree of divorce on an appeal therefrom by Dr.

Jones. He procured the dismissal of the appeal and shortly thereafter, in December, 1932, Dr. Jones was ordered committed to the county jail on Mrs. Jones' motion because of his refusal to pay past due alimony and the attorney's fees allowed her to defend against the appeal. Mrs. Jones then told the court that "she didn't want the doctor sent to jail" and the motion to commit was continued until March 10, 1933 upon the promise of Dr. Jones that he would try to raise the money and make some payments.

On March 8, 1933 Mrs. Jones wrote a letter to Attorney Dickerman which reads in part as follows:

"Dear Mr. Dickerman:-

This is to notify you that from this time on your services are no longer needed in connection with my case. You are not to represent me March 10th as my attorney.

Dr. Jones will pay you your fee as he gets the money to pay you, and I shall see to it that action is taken immediately to prevent you from continuously bring us into court, and threatening Dr. Jones with a jail sentence because of your fee.

You will have to content yourself with the amount Dr. Jones is able to pay you each month until your fee is paid."

After receiving the foregoing letter from Mrs. Jones, Dickerman served a notice on Dr. Jones, dated March 10, 1933, of the assignment made to him by Mrs. Jones on July 5, 1932. He testified that "at that time there was a depression and business was so bad I did not do anything further about collecting the money on this assignment."

On October 31, 1933 Mrs. Jones paid Attorney Dickerman \$30.50, for which he gave her a written receipt which recited that such payment was made "in reduction of \$250.00 assignment on decree."

Several years thereafter Attorney Dickerman brought suit against Dr. Jones on the assignment and according to

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to pay part due attorney and the attorney's fees allowed her to
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Jones. He procured the dismissal of the appeal and shortly

Dickerman, Dr. Jones testified on October 22, 1943 in that proceeding that "before he received the notice of assignment on March 10, 1933, he had settled with Mrs. Jones and paid her cash, and paid out cash for her in full settlement of the \$200 and the \$1,100 which the decree required him to pay Amy Jones" and that Amy V. Jones testified that "she received from Dr. Jones after July 5, 1932, and before March 10, 1933, cash money paid out for her benefit, which satisfied in full the \$200 and the \$1,100 out of which she assigned me [Dickerman] \$250." Judgment was entered in favor of Dr. Jones in that case on the ground that he had paid Amy V. Jones all the money due her under the decree before the notice of the assignment was served upon him. His claim on the assignment against Dr. Jones having been defeated by the receipt by Amy V. Jones from her former husband of the \$250 which she had theretofore assigned to him, Attorney Dickerman brought the instant action in contract on October 22, 1943 against Amy V. Jones for the balance of fees claimed to be due him for his legal services in prosecuting her suit for divorce to a decree.

Defendant contends that plaintiff's claim is barred by the statute of limitations. That of course would be true if plaintiff brought this action on his original oral contract of employment. The oral contract, however, anticipated that the parties would later enter into a written contract which could only be done under the terms of said oral contract after the decree was entered in the divorce case. Not until then could the parties have known what solicitor's fees would be allowed Mrs. Jones by the trial court or the extent and reasonable value of the services rendered by Dickerman.

Plaintiff's position is that his cause of action accrued on July 5, 1932, when Amy V. Jones in the instrument heretofore

on July 5, 1932, when Amy V. Jones in the instrument heretofore allowed Mrs. Jones by the trial court on the extent and reason- could the parties have known what solicitor's fees would be the decree was entered in the divorce case. Not until then could only be done under the terms of said oral contract after the parties would later enter into a written contract which of employment. The oral contract, however, anticipated that if plaintiff brought this action on his original oral contract by the statute of limitations. That of course would be true Defendant contends that plaintiff's claim is barred her suit for divorce to a decree.

claimed to be due him for his legal services in prosecuting October 22, 1941 against Amy V. Jones for the balance of fees Attorney Dickerman brought the instant action in contract on husband of the \$250 which she had theretofore assigned to him, been defeated by the receipt by Amy V. Jones from her former upon him. His claim on the assignment against Dr. Jones having under the decree before the notice of the assignment was served the ground that he had paid Amy V. Jones all the money due her Judgment was entered in favor of Dr. Jones in that case on the \$1,100 one of which she assigned me [Dickerman] \$250."

paid out for her benefit, which satisfied in full the \$200 and Jones after July 5, 1932, and before March 10, 1933, cash money and that Amy V. Jones testified that "she received from Dr. Dickerman, Dr. Jones testified on October 22, 1941 in that proceeding that "before he received the notice of assignment on March 10, 1933, he had settled with Mrs. Jones and paid her cash, and paid out cash for her in full settlement of the \$200 and the \$1,100 which the decree required him to pay Amy Jones"

set forth acknowledged her obligation to pay him the balance of \$250 due on his fees, that since she admittedly made a payment to him of \$30.50 on October 31, 1933 to apply on such balance, he had a right to bring this action within ten years after the date of such payment, that he filed this suit on October 22, 1943, which was less than ten years after Mrs. Jones made said payment of \$30.50 to him on October 31, 1933 and that therefore section 16 of the Limitations Act (par. 17, chap. 83, Ill. Rev. Stat. 1943) is applicable to the situation presented here. This section provides in part as follows:

"Actions on *** written contracts, or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued; but if any payment *** shall have been made *** on any contract, or other written evidence of indebtedness, within or after the said period of ten years, then an action may be commenced thereon at any time within ten years after the time of such payment."

It is conceded that Mrs. Jones' assignment to Attorney Dickerman did not extinguish her obligation to pay him the balance due on his fees. However, she insists that "her obligation to pay plaintiff was not in writing and was therefore governed by the five-year statute of limitations and became barred by the statute five *** years after October 31, 1933, the date on which the last payment was made by Mrs. Jones." In our opinion the instrument executed by Mrs. Jones on July 5, 1932 was more than an assignment. It recited her employment of Dickerman as her attorney to represent her in the divorce proceeding which he prosecuted to a decree and that he was entitled to receive a reasonable fee for the services rendered by him up to the time the decree was entered, such reasonable fee being \$500. The instrument served a two-fold purpose. It recognized and evidenced the obligation of defendant to pay plaintiff the balance due on his fees and then to secure the payment of such balance proceeded to assign to Attorney Dickerman a portion of

set forth acknowledged obligation to pay him the balance of \$200 due on his fees, that since she admittedly made a payment to him of \$20.00 on October 31, 1933 to apply on such balance, he had a right to bring this action within ten years after the date of such payment, that he filed this suit on October 22, 1943, which was less than ten years after Mrs. Jones made said payment of \$20.00 to him on October 31, 1933 and that therefore section 10 of the Limitations Act (par. 17, chap. 83, Ill. Rev. Stat. 1943) is applicable to the situation presented here. This section provides in part as follows:

"Actions on *** written contracts, or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued; but if any payment *** shall have been made *** on any contract, or other written evidence of indebtedness, within or after the said period of ten years, then an action may be commenced thereon at any time within ten years after the time of such payment."

It is conceded that Mrs. Jones' assignment to Attorney Dickman did not extinguish her obligation to pay him the balance due on his fees. However, she insists that "her obligation to pay plaintiff was not in writing and was therefore governed by the five-year statute of limitations and became barred by the statute five *** years after October 31, 1933, the date on which the last payment was made by Mrs. Jones."

In our opinion the instrument executed by Mrs. Jones on July 5, 1932 was more than an assignment. It recited her employment of Dickman as her attorney to represent her in the divorce proceeding which he presented to a decree and that he was entitled to receive a reasonable fee for the services rendered by him up to the time the decree was entered, such reasonable fee being \$200. The instrument served a two-fold purpose. It recognized and evidenced the obligation of defendant to pay plaintiff the balance due on his fees and then to secure the payment of such balance proceeded to assign to Attorney Dickman a portion of

the monies which the decree directed Dr. Jones to pay her. We think that the aforesaid instrument, in addition to including an assignment therein, was "an evidence of indebtedness in writing" within the purview of section 16 of the Limitations Act.

Defendant asserts that a confidential relationship existed between her and plaintiff and that **Attorney Dickerman** failed to prove that the assignment was not influenced by such relationship. There is not the slightest merit in this contention and it is raised for the first time in this court. It can hardly be advanced seriously because it is completely answered by one of the cases cited by defendant herself, Elmore v. Johnson, 143 Ill. 513, wherein the court said at p. 525:

"Before the attorney undertakes the business of the client, he may contract with reference to his services, because no confidential relation then exists and the parties deal with each other at arm's length. The same is true in regard to dealings which take place after the relation has been dissolved. (1 Story's Eq. Jur. - 13 ed. - secs. 310 to 313)."

It is uncontroverted that the original agreement between the parties was that Dickerman was to prosecute Mrs. Jones' divorce action to a decree and it is also uncontroverted that he did not represent her after the decree was entered on May 12, 1932, until she again employed him to defend her decree against Dr. Jones' appeal. In so far as the fees involved herein are concerned, the relation of attorney and client did not exist between the parties when Mrs. Jones obligated herself in writing to pay them.

Prior to the time plaintiff instituted this action he had received toward the payment of his \$500 fee \$75 as temporary solicitor's fees, \$175 allowed under the decree as additional solicitor's fees and the \$30.50 paid him by Mrs. Jones on October 31, 1933. These items aggregated \$280.50 and left a

the money which the deceased Mrs. Jones to pay her. He
thinks that the proposed assignment, in addition to including
an assignment therein, was an evidence of indebtedness in
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Act.

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existed between her and plaintiff and that Attorney Dickman
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refuted by one of the cases cited by defendant herself,
Thorne v. Johnson, 143 Ill. 515, wherein the court said at p.

251

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the parties was that Dickman was to prosecute Mrs. Jones'
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he did not represent her after the decree was entered on May 12,
1932, until she again employed him to defend her decree against
Dr. Jones' appeal. In so far as the fees involved herein are
concerned, the relation of attorney and client did not exist
between the parties when Mrs. Jones obligated herself in
writing to pay them.

Prior to the time plaintiff instituted this action he
had received toward the payment of his \$200 fee \$75 as temporary
attorney's fees, \$175 allowed under the decree as additional
attorney's fees and the \$30.50 paid him by Mrs. Jones on
October 21, 1933. These items aggregated \$200.50 and left a

-8-

balance due on his \$500 fee of \$219.50. The judgment entered by the trial court for \$329.75 included said balance of \$219.50 and interest thereon.

We are impelled to hold that this judgment was properly entered by the Circuit court of Cook county and it will therefore be affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

Balance due on this 500 fee of \$25.00. The judgment entered
by the trial court for \$32.75 including said balance of
\$7.75 and interest thereon.
We are inclined to hold that this judgment was
properly entered by the circuit court of Cook county and
it will therefore be affirmed.
JUDGMENT AFFIRMED.

Thompson, P. J., and Benjamin, J., concur.

43464

CATHERINE M. JACOBSON,
Appellee,

v.

CHICAGO MOTOR COACH COMPANY,
a corporation,
Appellant.

167 A
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

323 I.A. 131²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal, defendant, Chicago Motor Coach Company, seeks to reverse a judgment for \$1,000 entered on the verdict of a jury in favor of plaintiff, Catherine M. Jacobson, in an action to recover damages for personal injuries alleged to have been sustained by her as the result of the negligent operation of a bus owned by defendant.

Defendant's theory is that its chauffeur was operating a double deck bus in a northerly direction on Sheridan road and had stopped to discharge and pick up passengers at or approximately at one of its regular bus stops on the east side of Sheridan road and north of the north crosswalk of Pratt boulevard; that while the bus was so stopped the automobile in which plaintiff was riding was negligently driven into the rear end of the bus; and that it was not guilty of any negligence which proximately contributed to cause the accident.

Plaintiff's theory of fact as stated in her brief is that she was a guest passenger in the front seat of an automobile "which was being driven northward at a reasonable speed near the center line of Sheridan road, a heavily travelled six lane boulevard, that when the car in which she was riding was but a short distance away the bus of the defendant, which had been stopped at the curb on the northeast corner of Sheridan road and Pratt boulevard, pulled out

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By this appeal, defendant, Chicago Motor Coach Company, seeks to reverse a judgment for \$1,000 entered on the verdict of a jury in favor of plaintiff, Catherine E. Jacobson, in an action to recover damages for personal injuries alleged to have been sustained by her as the result of the negligent operation of a bus owned by defendant.

Defendant's theory is that its chauffeur was operating a double deck bus in a northerly direction on Sheridan road and had stopped to discharge and pick up passengers at or approximately at one of its regular bus stops on the east side of Sheridan road and north of the north crosswalk of Pratt boulevard; that while the bus was so stopped the automobile in which plaintiff was riding was negligently driven into the rear end of the bus; and that it was not guilty of any negligence which proximately contributed to cause the accident.

Plaintiff's theory of fact as stated in her brief is that she was a guest passenger in the front seat of an automobile "which was being driven northward at a reasonable speed near the center line of Sheridan road, a heavily travelled six lane boulevard, that when the car in which she was riding was but a short distance away the bus of the defendant, which had been stopped at the curb on the northeast corner of Sheridan road and Pratt boulevard, pulled out

suddenly into the lane of the private car to go around cars parked ahead in front of the Rogers Park Hotel, then stopped again suddenly to let off another passenger when 15 or 20 feet in front of the private car, that the driver of the private car applied his brakes but the distance was too short and he could not turn out to his left because of heavy southbound traffic."

The accident occurred on Sheridan road north of Pratt boulevard on April 15, 1942 shortly after 12:30 A.M. At that point Sheridan road runs due north and south and Pratt boulevard runs east and west. Sheridan road is a wide, heavily travelled boulevard with three lanes on the east half of the street for northbound traffic and three lanes on the west half of the street for southbound traffic. The weather was clear, the streets were dry and Sheridan road was well lighted.

Plaintiff testified on direct examination that on the occasion in question she was riding north on Sheridan road on the front seat of an automobile which was owned and being driven by one Edward Hartwell; that he was driving "close to the center line" or "toward the middle of the street"; that just as he reached Pratt boulevard Hartwell was driving at a speed of about 20 or 25 miles per hour; that when she first saw the bus, it was "in front of us, and it pulled in to the curb to let off passengers, and there was double parking there, and he pulled quickly around the cars parked and then out in the center lane and then stopped and let more passengers off"; that when the bus pulled out to go into the traffic lane in which Hartwell was driving, his car was about 15 or 20 feet behind it; that after the bus pulled out from the curb "it stopped again and some more passengers got off, and that is when we hit it"; that "there was heavy southbound traffic" in

and he could not turn out to his left because of heavy traffic. The accident occurred on Sheridan road north of Pratt boulevard on April 15, 1942 shortly after 12:30 A.M. At that point Sheridan road runs due north and south and Pratt boulevard runs east and west. Sheridan road is a wide, heavily travelled boulevard with three lanes on the east half of the street for northbound traffic and three lanes on the west half of the street for southbound traffic. The weather was clear, the streets were dry and Sheridan road was well lighted. Plaintiff testified on direct examination that on the occasion in question she was riding north on Sheridan road on the front seat of an automobile which was owned and being driven by one Edna Hartwell; that he was driving "close to the center line" or "toward the middle of the street"; that just as he reached Pratt boulevard Hartwell was driving at a speed of about 20 or 25 miles per hour; that when she first saw the bus, it was "in front of us, and it pulled in to the curb to let off passengers, and there was double parking there, and he pulled quickly around the cars parked and then cut in the center lane and then stopped and let more passengers off"; that when the bus pulled out to go into the traffic lane in which Hartwell was driving, his car was about 15 or 20 feet behind it; that after the bus pulled out from the curb "it stopped again and some more passengers got off, and that is when we hit it"; that "there was heavy southbound traffic" in

the west half of Sheridan road; that when she first saw the bus, Hartwell "put on the brakes" and that after he put on the brakes, "we struck the bus"; and that from the time he put on the brakes until his car struck the bus, "I only know that the bus pulled out and then stopped dead, and then after that I don't know what happened."

The following occurred on plaintiff's cross-examination:

"Q. Well, now, where was your automobile when you first observed this bus? Do you recall that? A. Well, I remember it as it crossed Pratt. Q. Is that the first time that you saw the bus? A. No, I suppose I saw it before, but I don't remember definitely. Q. But you do recall it as it was crossing Pratt Boulevard? A. Yes. Mr. Graham [plaintiff's attorney]: She said as her car was crossing Pratt Boulevard, as I understand. MR. Glick: [defendant's attorney]: Q. What is your answer? Did you observe the bus as the bus was crossing Pratt Boulevard? A. No, we were crossing Pratt Boulevard."

She testified further on cross-examination that as Hartwell's car was crossing Pratt boulevard it was in the middle lane "near the white line"; that at that time she saw the bus "at the [northeast] curb *** in front of the Rogers Park Hotel"; that "it was standing still, because the passengers were getting off"; that the bus "stopped before we crossed Pratt Boulevard"; that when Hartwell's car was crossing Pratt boulevard "the bus was on the east side of Pratt"; that she could not say definitely that she saw the bus as Hartwell's car was crossing Pratt boulevard, "because all I remember is the bus being there and pulling out and going around these cars"; that when she first saw the bus "naturally, it was on the east curb" of Sheridan road. Then the following questions were asked her and she

the west half of Sheridan road; that when she first saw the bus, Hartwell "put on the brakes" and that after he put on the brakes, "a truck hit the bus"; and that from the time he put on the brakes until his car struck the bus, "I only know that the bus pulled out and then stopped dead, and then after that I don't know what happened."

The following occurred on plaintiff's cross-examination:

"Q. Well, now, where was your automobile when you first observed this bus? Do you recall that? A. Well, I remember it as it crossed Pratt. Q. Is that the first time that you saw the bus? A. No, I suppose I saw it before, but I don't remember definitely. Q. But you do recall it as it was crossing Pratt Boulevard? A. Yes. Q. Plaintiff's attorney: The said as her car was crossing Pratt Boulevard, as I understand. Mr. Gluck: [defendant's attorney]: Q. That is your answer? Did you observe the bus as the bus was crossing Pratt Boulevard? A. No, we were crossing Pratt Boulevard."

The testified further on cross-examination that as Hartwell's car was crossing Pratt Boulevard it was in the middle lane "near the white line"; that at that time she saw the bus "at the [northeast] curb *** in front of the Rogers Park Hotel"; that "it was standing still, because the passengers were getting off"; that the bus "stopped before we crossed Pratt Boulevard"; that when Hartwell's car was crossing Pratt Boulevard "the bus was on the east side of Pratt"; that she could not say definitely that she saw the bus as Hartwell's car was crossing Pratt Boulevard, "because all I remember is the bus being there and pulling out and going around these cars"; that when she first saw the bus "naturally, it was on the east curb" of Sheridan road. Then the following questions were asked her and she

made the answers as indicated: "Q. And at that time was it moving or standing still? A. It was idling and it pulled out. Q. Well, was it in motion when you first saw it? A. Yes, naturally, when it come out in front of me. Q. At that time where were you? A. We were crossing Pratt. Q. How far from the bus were you at that time? A. About 20 or 30 feet. Q. Was the bus moving directly north when you saw it? A. Yes *** and it seemed that it was going right on ahead."

She also testified that as she "saw the bus moving directly north," Hartwell's car was "about 20 or 30 feet" from the rear of the bus and that he was driving at a speed of "about 20 or 25" miles an hour; that as the bus pulled out from the curb it "started fast, he pulled out and around quite fast, but I don't know what rate of speed it was"; that as the bus was going north to go around the cars that were double parked at the east curb it was moving faster than Hartwell's car; that Hartwell's car was "right in back" of the bus when it collided with the rear end of it; that whether she saw that the bus was lighted or whether Hartwell's car struck the bus directly in the rear "didn't come into it *** I mean that it had no bearing on it, because if we had gone around the bus, which was the only alternative, we would hit the cars going south"; that she did not know that Hartwell's car was going to run into the rear end of the bus; that "we had collided with the bus" when it stopped the second time and "I believe one woman was alighting from the bus *** was thrown *** he was letting out more passengers"; that when the bus stopped suddenly Hartwell's car was "about 20 feet from the rear end of it"; that she did not know whether Hartwell's car was 20 feet from the rear end of the bus when it stopped; that "when it stopped we collided, but previous to that when it pulled out we were a good 20 or 30 feet behind it"; and that when the bus pulled

made the answers as indicated: "Q. And at that time was it moving or standing still? A. It was falling and it pulled out. Q. Well, was it in motion when you first saw it? A. Yes, naturally, when it came out in front of me. Q. At that time where were you? A. I was crossing Pratt. Q. How far from the bus were you at that time? A. About 20 or 30 feet. Q. Was the bus moving directly north when you saw it? A. Yes -- and it seemed that it was going right on ahead."

She also testified that as she "saw the bus moving directly north," Hartwell's car was "about 20 or 30 feet from the rear of the bus and that he was driving at a speed of "about 20 or 25" miles an hour; that as the bus pulled out from the curb it "started fast, he pulled out and around quite fast, but I don't know what rate of speed it was"; that as the bus was going north to go around the cars that were double parked at the east curb it was moving faster than Hartwell's car; that Hartwell's car was "right in back" of the bus when it collided with the rear end of it; that whether she saw that the bus was lighted or whether Hartwell's car struck the bus directly in the rear "didn't come into it -- I mean that it had no bearing on it, because if we had gone around the bus, which was the only alternative, we would hit the cars going south"; that she did not know that Hartwell's car was going to run into the rear end of the bus; that "we had collided with the bus" when it stopped the second time and "I believe one woman was alighting from the bus -- was known -- he was letting out more passengers"; that when the bus stopped suddenly -- if Hartwell's car was "about 20 feet from the rear end of it"; that she did not know whether Hartwell's car was 20 feet from the rear end of the bus when it stopped; that "when it stopped we collided, but previous to that when it pulled out we were a good 20 or 30 feet behind it"; and that when the bus pulled

out and stopped Hartwell's car "wasn't moving fast *** it was going about 20 or 25, I would say *** I didn't look at the speedometer."

We have set forth the testimony of plaintiff practically in its entirety for the purpose of showing how vague, indefinite and evasive she was in relating her version as to how and where the accident happened.

Edward Hartwell, the driver of the automobile in which plaintiff was riding, was in the Army in France at the time of the trial and was therefore not available as a witness.

Six witnesses testified in defendant's behalf - Katia Vasseur, Samuel Swerinsky, Ada House, Irving Glasky, Alice Momsen and Judith Bearfield.

Katia Vasseur, who was employed by the United States Treasury Department, testified that she was a passenger on the bus; that there was a regular bus stop on the east side of Sheridan road north of the north crosswalk of Pratt boulevard; that defendant's bus stopped a few feet away from the curb on the east side of Sheridan road; that while it was stopped there "for people to get off" she heard a "bump" in back of the bus; that she did not remember whether there were cars parked between the bus and the curb when it stopped; and that it stopped in such a position that it could proceed north without "swinging out."

Samuel Swerinsky testified that he was a police officer of the City of Chicago; that he was off duty at the time and was in a drug store at the northeast corner of Sheridan road and Pratt boulevard; that he did not see the accident but heard the "crash"; that he went right out to the scene of the accident and saw a bus "standing" there discharging some passengers on the northeast corner; that the east side of

out and stopped Bartell's car "wasn't moving fast" it was going about 20 or 25, I would say "I didn't look at the speedometer."

He has set forth the testimony of plaintiff's expert in its entirety for the purpose of showing how vague, indefinite and evasive she was in relating her version as to how and where the accident happened.

Ed and Bartell, the driver of the automobile in which plaintiff was riding, was in the Army in France at the time of the trial and was therefore not available as a witness.

Six witnesses testified in defendant's behalf - Leticia Vasseur, Samuel Szwernisky, Ada Hesse, Irving Glasky, Alice Hansen and Judith Hofffield.

Leticia Vasseur, who was employed by the United States Treasury Department, testified that she was a passenger on the bus; that there was a regular bus stop on the east side of Sheridan road north of the north crosswalk of Pratt boulevard; that defendant's bus stopped a few feet away from the curb on the east side of Sheridan road; that while it was stopped there "for people to get off" she heard a "bump" in back of the bus; that she did not remember whether there were cars parked between the bus and the curb when it stopped; and that it stopped in such a position that it could proceed north without "swinging out."

Samuel Szwernisky testified that he was a police officer of the City of Chicago; that he was off duty at the time and was in a drug store at the northeast corner of Sheridan road and Pratt boulevard; that he did not see the accident but heard the "crash"; that he went right out to the scene of the accident and saw a bus "standing" there discharging some passengers on the northeast corner; that the east side of

the bus was about 4 or 5 feet from the east curb and its rear end was a few feet north of the north crosswalk of Pratt boulevard; that the bus was facing directly north; that the front end of an automobile, which was "all smashed up", was then about a foot or a foot and one-half south of the rear end of the bus; that he inspected the stop lights on each side of the rear end of the bus and found that they were in proper working order; and that **there** was no car parked between the curb and the bus where the latter was stopped but that there were cars parked "north of that."

Ada House testified that she was a housewife and that she was a passenger on the bus; that the bus stopped at its usual stopping place; that it was facing directly north when it stopped; that while passengers were being unloaded there was a "severe crash from the rear that threw her against the seat in front"; that at the time of the crash the bus was standing still about 4 or 5 feet from the east curb; and that she did not recall any cars parked between the bus and the curb.

Irving Glasky testified by deposition that he was the chauffeur of the bus; that there were cars parked along the east curb of Sheridan road north of Pratt boulevard; that he stopped the bus at the regular stopping place 5 or 10 feet north of Pratt boulevard; that he was double parked due to the fact that there were cars parked along the east curb; that he stopped the bus about 2 feet west of such parked cars so that he could discharge passengers; that the east side of the bus was about 8 or 10 feet from the east curb; that just as he was about to open the front door he heard the impact at the end of the coach; that he got out and walked back and saw a car up against the rear end of the coach with its front end down on the

the bus was about 4 or 5 feet from the east curb and its rear end was a few feet north of the north crosswalk of Pratt Boulevard; that the bus was facing directly north; that the front end of the automobile, which was "all smashed up", was then about a foot or a foot and one-half south of the rear end of the bus; that he inspected the stop lights on each side of the rear end of the bus and found that they were in proper working order; and that there was no car parked between the curb and the bus where the latter was stopped but that there were cars parked "north of that."

Ada Louise testified that she was a housewife and that she was a passenger on the bus; that the bus stopped at its usual stopping place; that it was facing directly north when it stopped; that while passengers were being unloaded there was a "severe crash from the rear that threw her against the seat in front"; that at the time of the crash the bus was standing still about 4 or 5 feet from the east curb; and that she did not recall any cars parked between the bus and the curb.

Irving Glaspy testified by deposition that he was the chauffeur of the bus; that there were cars parked along the east curb of Sheridan road north of Pratt Boulevard; that he stopped the bus at the regular stopping place 5 or 10 feet north of Pratt Boulevard; that he was double parked due to the fact that there were cars parked along the east curb; that he stopped the bus about 2 feet west of such parked cars so that he could alight passengers; that the east side of the bus was about 10 or 15 feet from the east curb; that just as he was about to open the front door he heard the impact at the end of the coach; that he got out and walked back and saw a car up against the rear end of the coach with its front end down on the

street; that the front end of the car was demolished; that his bus was stopped in the second lane of traffic from the east curb and the left side of his bus was about 6 or 8 feet from the "center of the road"; and that he stopped a few seconds before the impact and that all his tail lights and stop lights were "okay."

Alice Momsen testified that she was employed at the United States post office; that she was a passenger in the bus and was sitting in the front seat thereof intending to alight when it stopped at Pratt boulevard; that the bus stopped at Pratt boulevard on the north side of the street; that when it came to a stop it was about the width of a car from the east curb; that there were cars parked along the east curb of Sheridan road a little bit north of where the bus stopped; that the driver opened the front door of the bus and when he did so she put one foot down on the step; that she then heard a crash and turned to see what happened; that she got out of the bus and saw the automobile which hit it; that the car was directly behind the bus; that at the time it was struck the rear end of the bus was almost the length of an automobile north of the north crosswalk of Pratt boulevard facing directly north; that prior to the accident the bus made only one stop on Sheridan road north of Pratt boulevard; and that she was injured by the closing of the door of the bus on her shoulder while she was in the act of alighting therefrom.

Judith Bearfield testified that she was a nurse at St. Luke's Hospital; that she was a passenger on the bus; that it stopped on the north side of Pratt boulevard facing directly north and not far from the east curb of Sheridan road; that she did not know the actual distance the bus was from the east curb of Sheridan road; that while the bus was standing still

street; that the front end of the car was demolished; that the bus was stopped in the second lane of traffic from the east curb and the left side of the bus was about 6 or 8 feet from the "center of the road"; and that he stopped a few seconds before the impact and that all his tail lights and stop lights were "okay."

Alice Benson testified that she was employed at the United States post office; that she was a passenger in the bus and was sitting in the front seat thereof intending to alight when it stopped at Pratt Boulevard; that the bus stopped at Pratt Boulevard on the north side of the street; that when it came to a stop it was about the width of a car from the east curb; that there were cars parked along the east curb of Sheridan road a little bit north of where the bus stopped; that the driver opened the front door of the bus and when he did so she put one foot down on the step; that she then heard a crash and turned to see what happened; that she got out of the bus and saw the automobile which hit it; that the car was directly behind the bus; that at the time it was struck the rear end of the bus was almost the length of an automobile north of the north crosswalk of Pratt Boulevard facing directly north; that prior to the accident the bus made only one stop on Sheridan road north of Pratt Boulevard; and that she was injured by the closing of the door of the bus on her shoulder while she was in the act of alighting therefrom.

Judith Bearfield testified that she was a nurse at St. Luke's Hospital; that she was a passenger on the bus; that it stopped on the north side of Pratt Boulevard facing directly north and not far from the east curb of Sheridan road; that she did not know the actual distance the bus was from the east curb of Sheridan road; that while the bus was standing still

"all of a sudden there was a terrific jar *** that came from the rear end of the bus"; that she alighted from the bus and saw the car that had "bumped into the back" of it; that the rear end of the bus was north of the north crosswalk of Pratt boulevard; that to the best of her knowledge the back of the bus "was about an extra large step from the curb"; that the front end of the bus was a little farther from the curb than the rear end; and that after the crash all the passengers wandered to the front end of the bus and got out.

Plaintiff testified in rebuttal by way of impeachment of Alice Momsen, one of defendant's witnesses, that when she was being taken to the hospital in the squad car and while she was in the hospital immediately after the accident occurred, Alice Momsen was with her and that Alice Momsen told her both in the squad car and in the hospital that "when the bus reached Pratt boulevard it stopped at the regular stop and let off several passengers *** and that after letting out several passengers he pulled out and at her [Alice Momsen's] insistence he stopped suddenly by throwing the brakes suddenly and opening the door."

Alice Momsen denied that she made the foregoing statements attributed to her by plaintiff.

The defendant urges other points for reversal predicated on the asserted failure of plaintiff to prove her cause of action but we only deem it necessary to consider defendant's contention that "the verdict and judgment are contrary to the manifest weight of the evidence."

Every witness in this case, including plaintiff, testified that the bus stopped at or approximately at the regular bus stop at the northeast corner of Sheridan road and Pratt boulevard. Every witness, including plaintiff, testified that when the bus stopped its rear end was a short distance north

"All of a sudden there was a terrific jolt that came from the rear end of the bus"; that she alighted from the bus and saw the car that had "popped into the back" of it; that the rear end of the bus was north of the north crosswalk of Pratt Boulevard; that to the best of her knowledge the back of the bus "was about an extra large step from the curb"; that the front end of the bus was a little farther from the curb than the rear end; and that after the crash all the passengers tumbled to the front end of the bus and got out.

Plaintiff testified in rebuttal by way of impeachment of Alice Hansen, one of defendant's witnesses, that when she was being taken to the hospital in the squad car and while she was in the hospital immediately after the accident occurred, Alice Hansen was with her and that Alice Hansen told her both in the squad car and in the hospital that "when the bus reached Pratt Boulevard it stopped at the regular stop and let off several passengers" and that after letting out several passengers he pulled out and at her [Alice Hansen's] insistence he stopped suddenly by throwing the brakes suddenly and opening the door."

Alice Hansen denied that she made the foregoing statements attributed to her by plaintiff.

The defendant urges other points for reversal predicated on the asserted failure of plaintiff to prove her cause of action but we only deem it necessary to consider defendant's contention that "the verdict and judgment are contrary to the manifest weight of the evidence."

Very witness in this case, including plaintiff, testified that the bus stopped at or approximately at the regular bus stop at the northeast corner of Sheridan road and Pratt Boulevard. Very witness, including plaintiff, testified that when the bus stopped its rear end was a short distance north

of the north crosswalk of Pratt boulevard. Defendant's witnesses testified variously that the rear end of the bus was from a few feet to about 10 feet or the length of an automobile north of the north crosswalk of Pratt boulevard when it stopped. Plaintiff testified that the bus "pulled in to the [east] curb to let off passengers." Defendant's six witnesses testified variously that when the bus stopped to discharge passengers, its east side was from about 2 feet to 10 feet from the east curb of Sheridan road. According to plaintiff the bus stopped at the east curb of Sheridan road with double parked automobiles ahead of it, let off some passengers, hurriedly pulled around the double parked cars until it was headed directly north in the third lane of traffic west of the east curb, then suddenly stopped again and some more passengers got off and that "is when we hit it." Also according to plaintiff's testimony and her theory of fact, as stated in her brief, Hartwell was driving close to the "center line" of Sheridan road when his car ran into the rear end of the bus. Plaintiff did not testify directly as to just where in Sheridan road the bus and Hartwell's car were after the accident but if, as she states, the bus had pulled around the cars that were doubled parked at the east curb and had reached a position near the "center line" of Sheridan road headed directly north when it was struck, its rear end at that time must have been considerably more than a bus length north of the north crosswalk of Pratt boulevard and even a greater distance northwest of the point at the east curb where she said she saw the bus "standing still."

Plaintiff's testimony as to the manner in which the accident happened and the point where it occurred is not corroborated by a single witness or by any fact or circumstance

of the north crosswalk of Pratt Boulevard. Defendant's witness testified variously that the rear end of the bus was from a few feet to about 10 feet or the length of an automobile north of the north crosswalk of Pratt Boulevard when it stopped. Plaintiff testified that the bus "pulled in to the [east] curb to let off passengers." Defendant's six witnesses testified variously that when the bus stopped to discharge passengers, its east side was from about 2 feet to 10 feet from the east curb of Sheridan Road. According to plaintiff the bus stopped at the east curb of Sheridan Road with double parked automobiles ahead of it, let off some passengers, hurriedly pulled around the double parked cars until it was headed directly north in the third lane of traffic west of the east curb, then suddenly stopped again and some more passengers got off and that "as when we hit it." Also according to plaintiff's testimony and her theory of fact, as stated in her brief, Martwell was driving close to the "center line" of Sheridan Road when his car ran into the rear end of the bus. Plaintiff did not testify directly as to just where in Sheridan Road the bus and Martwell's car were after the accident but it, as she states, the bus had pulled around the cars that were double parked at the east curb and had reached a position near the "center line" of Sheridan Road headed directly north when it was struck, its rear end at that time must have been considerably more than a bus length north of the north crosswalk of Pratt Boulevard and even a greater distance northwest of the point at the east curb where she said she saw the bus "standing still."

Plaintiff's testimony as to the manner in which the accident happened and the point where it occurred is not corroborated by a single witness or by any fact or circumstance

in evidence. Not only is her testimony inherently improbable but it is contradicted by six witnesses, five of whom were wholly disinterested. Since these ^{six} witnesses testified that the bus was standing still from 2 to 10 feet north of the north crosswalk of Pratt boulevard at or approximately at the regular bus stop on the east side of Sheridan road when Hartwell's car smashed into the rear end of it, the conclusion is inevitable that the accident did not happen and could not have happened in the manner plaintiff testified that it did. Inasmuch as the evidence clearly shows that defendant's large, well lighted bus was where it had a right to be on Sheridan road when it stopped to discharge passengers and inasmuch as Hartwell's view to the north was unobstructed as his car approached and reached Pratt boulevard from the south, we think that his "smashing" into the rear end of the standing bus can only be attributed to his negligent failure to keep a proper lookout.

We are impelled to hold that the verdict was against the manifest weight of the evidence.

We had occasion in the recent case of McCormack v. Chicago Surface Lines, 327 Ill. App. 208 (abst.) to consider a factual situation in a personal injury case where the uncorroborated testimony of the plaintiff was contradicted by six witnesses, three of whom were disinterested. In that case we said:

"We are firm believers in the jury system and are in full accord with the rule stated by the Supreme court in People v. Hanisch, 361 Ill. 465, 468, that 'The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury.' We are satisfied, however, after a careful analysis of the evidence, that the verdict of the jury in the instant case cannot be sustained. In weighing the evidence we were bound to consider plaintiff's uncorroborated testimony as to the manner in which the accident occurred in the light of his personal interest in the suit."

In Reinowski v. Richardson et al., 279 Ill. App. 633

in evidence, not only as her testimony inherently improbable but it is contradicted by six witnesses, five of whom were wholly disinterested. Since these ^{six} witnesses testified that the bus was standing still from 2 to 10 feet north of the north crosswalk of Pratt Boulevard at or approximately at the regular bus stop on the east side of Sheridan road when Hartwell's car skidded into the rear end of it, the conclusion is inevitable that the accident did not happen and could not have happened in the manner plaintiff testified that it did, inasmuch as the evidence clearly shows that defendant's large, well lighted bus was where it had a right to be on Sheridan road when it stopped to discharge passengers and inasmuch as Hartwell's view to the north was unobstructed as his car approached and reached Pratt Boulevard from the south, we think that his "stopping" into the rear end of the standing bus can only be attributed to his negligent failure to keep a proper lookout.

It is impelled to hold that the verdict was against the manifest weight of the evidence.

On the occasion in the recent case of McGormack v. Chicago

Surface Lines, 329 Ill. App. 208 (1st.), to consider a factual situation in a personal injury case where the uncorroborated testimony of the plaintiff was contradicted by six witnesses, three of whom were disinterested. In that case we said:

"We are firm believers in the jury system and are in full accord with the rule stated by the Supreme Court in People v. Lattin, 361 Ill. 405, 408, that 'the utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the jury's verdict.' We are satisfied, however, after a careful analysis of the evidence, that the verdict of the jury in the instant case cannot be sustained. In weighing the evidence we were bound to consider plaintiff's uncorroborated testimony as to the manner in which the accident occurred in the light of his personal interest in the suit."

(abst.) the court said:

"This is not a case where the uncorroborated testimony of the plaintiff is contradicted by one unimpeached witness only. Plaintiff was flatly contradicted on the essential fact on which he bases his case by five unimpeached witnesses, all of whom were in as good position to know whether the car jerked or swayed as was plaintiff and each of them testified positively that it did not do so. Moreover, four of defendants' witnesses stated positively that plaintiff had stepped from the car and was standing on the pavement momentarily when struck by a passing automobile. Under ordinary circumstances, the number of witnesses alone, testifying for or against an essential fact, do not necessarily determine the weight or preponderance of the evidence, but in this case plaintiff's testimony is so utterly irreconcilable with that related by defendants' witnesses, and so inconsistent with the probabilities of the circumstances shown, as to lend support to defendants' contention that the verdict was against the manifest weight of the evidence."

Having disposed of the principal point urged for reversal, we deem it appropriate for the guidance of counsel, in the event that this case is retried, to consider the question, which arose upon the trial of this case, as to the admissibility of evidence of a settlement made by the defendant with one of its witnesses who was also injured in the accident involved herein.

Defendant contends that "it was highly prejudicial and improper for plaintiff's counsel to show that a settlement was made by the defendant with one of the witnesses."

Plaintiff's position in this regard is that "it was proper to bring out the fact from defendant's witness, Alice Momsen, that she had brought suit and settled with the defendant for injuries claimed in the same accident, not to show an admission of liability on the part of the defendant, but to show such witness's interest and as affecting her credibility."

As has been seen, Alice Momsen, one of the witnesses called by the defendant, was a passenger on the bus involved in the accident. It is asserted in defendant's brief that she made claim and subsequently instituted suit against the

(Abat.) the court said:

"This is not a case where the uncorroborated testimony of the plaintiff is contradicted by one unimpeached witness only. Plaintiff was firstly contradicted on the essential fact on which he bases his case by five unimpeached witnesses, all of whom were in as good position to know whether the car jerked or waked as was plaintiff, and each of them testified positively that it did not do so. Moreover, four of defendants' witnesses stated positively that plaintiff had stopped from the car and was standing on the pavement momentarily when struck by a passing automobile. Under ordinary circumstances, the number of witnesses alone, testifying for or against an essential fact, do not necessarily determine the weight or preponderance of the evidence, but in this case plaintiff's testimony is so utterly irreconcilable with that related by defendants' witnesses, and so inconsistent with the probabilities of the circumstances shown, as to lend support to defendants' contention that the verdict was against the manifest weight of the evidence."

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Defendant contends that "it was highly prejudicial and improper for plaintiff's counsel to show that a settlement was made by the defendant with one of the witnesses." Plaintiff's position in this regard is that "it was proper to bring out the fact from defendant's witness, Alice Hansen, that she had brought suit and settled with the defendant for injuries claimed in the same accident, not to show an admission of liability on the part of the defendant, but to show such witness's interest and as affecting her credibility."

As has been seen, Alice Hansen, one of the witnesses called by the defendant, was a passenger on the bus involved in the accident. It is asserted in defendant's brief that she made claim and subsequently instituted suit against the

defendant for damages for injuries alleged to have been sustained by her as a result of this accident; that her claim was settled by the defendant before the trial of this case; and that these facts were known to plaintiff's attorney. In the presence of the jury the following occurred during the cross-examination of Alice Momsen by Mr. Graham, plaintiff's attorney:

"Q. And you filed suit against the Bus Company, didn't you? Mr. Glick: That is objected to. The Court: Objection sustained. Mr. Glick: I ask the Court to instruct the jury to disregard it. The Court: The jury are so instructed. *** Mr. Graham: Q. You received a settlement from the Chicago Motor Coach Company, didn't you? Mr. Glick: That is objected to. The Court: Sustain the objection. Mr. Glick: I ask that the jury be instructed. The Court: I will instruct the jury."

On Attorney Graham's insistence that he had the right to inquire into the matter of the settlement made by defendant with Alice Momsen, not for the purpose of showing an admission of liability for the accident on the part of defendant but to show her interest in the outcome of the case and the effect such interest might have upon her credibility, the trial court heard counsel on this question out of the presence of the jury and apparently decided to permit him to interrogate the witness as to whether she filed suit against the defendant but not as to whether she effected a settlement with it. The following occurred when the jury was recalled and the trial resumed:

"Mr. Graham: Miss Momsen, you brought suit against the Chicago Motor Coach Company, did you? The witness: A. Yes, I did. Q. And that suit was pending until two weeks ago? Mr. Glick: That is objected to. The Court: Sustained."

defendant for damages for injuries alleged to have been sustained by him as a result of this accident; that her claim was settled by the defendant before the trial of this case; and that these facts were known to plaintiff's attorney, in the presence of the jury the following occurred during the cross-examination of Miss Brown by Mr. Graham, plaintiff's

attorney:

"Q. And you filed suit against the Bus Company, didn't you? Mr. Glick: That is objected to. The Court: Objection sustained. Mr. Glick: I ask the Court to instruct the jury to disregard it. The Court: The jury are so instructed. *** Mr. Graham: You received a settlement from the Chicago Motor Coach Company, didn't you? Mr. Glick: That is objected to. The Court: Sustain the objection. Mr. Glick: I ask that the jury be instructed. The Court: I will instruct the jury."

In Attorney Graham's insistence that he had the right to introduce into the matter of the settlement made by defendant with Miss Brown, not for the purpose of showing an admission of liability for the accident on the part of defendant but to show her interest in the outcome of the case and the effect such interest might have upon her credibility, the trial court heard counsel on this question out of the presence of the jury and apparently decided to permit him to interrogate the witness as to whether she filed suit against the defendant but not as to whether she effected a settlement with it. The following occurred when the jury was recalled and the trial resumed:

"Mr. Graham: Miss Brown, you brought suit against the Chicago Motor Coach Company, did you? The witness: A. Yes, I did. Q. And that suit was pending until two weeks ago? Mr. Glick: That is objected to. The Court: Sustained."

Having previously interrogated Alice Momsen as to whether she had received a settlement from defendant, the foregoing question - "And that suit was pending until two weeks ago?" - was undoubtedly asked so that the jury might infer that Alice Momsen's suit was no longer pending because she had received a settlement.

While plaintiff's counsel in his argument to the jury made no direct reference to defendant's settlement with Alice Momsen, there is no question but that in said argument he sought by inference to leave the impression with the jury that such settlement had been made and that if defendant was not responsible for the accident it would not have settled with her. The endeavor of plaintiff's counsel to show by inference both in his examination of the witness and in his argument to the jury that a settlement had been made with her could only have been calculated to prejudice the jury. In our opinion the jury must have been prejudiced by the conduct of plaintiff's attorney in this regard, because we are unable to comprehend how it could otherwise have found the defendant liable under the facts and circumstances shown by the evidence in this case.

Plaintiff cites cases from a few sister states that support her position in respect to the instant contention but these cases are in conflict with the great weight of authority that evidence of settlements is not admissible for any purpose. The general rule is that "a settlement between a party and a third person cannot be shown, even though it relates to the matters involved in the action and the person with whom the compromise was made was in the same position as the party seeking to show such settlement." 31 C. J. S., sec. 292, p. 1055. The only exception to this general rule is where a settlement is made under such unusual circumstances as to warrant its admission in evidence in further-

Having previously interrogated Alice Hansen as to whether she had received a settlement from defendant, the foregoing question - "and that suit was pending until two weeks ago?" - was undoubtedly asked so that the jury might infer that Alice Hansen's suit was no longer pending because she had received a settlement.

While plaintiff's counsel in his argument to the jury made no direct reference to defendant's settlement with Alice Hansen, there is no question but that in said argument he sought by inference to leave the impression with the jury that such settlement had been made and that if defendant was not responsible for the accident it would not have settled with her. The endeavor of plaintiff's counsel to show by inference both in his examination of the witness and in his argument to the jury that a settlement had been made with her could only have been aided to prejudice the jury. In our opinion the jury must have been prejudiced by the conduct of plaintiff's attorney in this regard, because we are unable to comprehend how it could otherwise have found the defendant liable under the facts and circumstances shown by the evidence in this case.

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ance of justice. There was no showing that there were any unusual circumstances in this case in connection with defendant's settlement with Alice Momsen. All the plaintiff sought to show was the fact that said settlement had been made. Alice Momsen was in an entirely different position in relation to the accident than was plaintiff. Alice Momsen was a passenger on the bus. Plaintiff was a passenger in the automobile that ran into the bus.

The principle underlying the rule excluding evidence of a settlement with a third person injured as a result of the same occurrence is stated by Mr. Justice Lamar in a well reasoned opinion in Georgia Ry. & Elec. Co. v. Wallace & Co., 122 Ga. 547, 50 S. E. 478, where it was said at p. 480 of the last mentioned report:

"It costs time, trouble and money to defend even an unfounded claim. Parties have a right to purchase their peace. The fact that they have entered into negotiations to secure that end, admissions or propositions made with a view to a compromise are not admissible in evidence for or against either litigant, in the event there is a failure to adjust and a suit follows. For a much stronger reason, evidence of a settlement with a third person injured in the same casualty ought to be excluded. *** The rule against allowing evidence of compromise is founded upon recognition of the fact that such testimony is inherently harmful, for the jury will draw conclusions therefrom in spite of anything said by the parties at the time of discussing the compromise, and in spite of anything which may be said by the judge in instructing them as to the weight to be given such evidence."

The question as to the admissibility of evidence as to a settlement made with a third person involved in the same accident was considered in the comparatively recent case of Hill v. Hiles, 309 Ill. App. 321. There the court said at pp. 330-332:

"The question has been fully considered by the courts of highest authority in a number of other jurisdictions and it has been generally held that evidence of settlements made with third parties involved in the same accident is inadmissible. *** The Illinois courts have consistently refused to permit evidence of mere offers and negotiations for settlement to reach the jury on the ground that public policy favors the settlement of claims outside of court. (Gehm v. People, 87 Ill. App. 158; Edwin S. Hartwell Lumber Co. v. Bork, 138 Ill. App. 506; Graff v. Fox, 204 Ill. App. 598.) We think that this same public policy applies when an actual settlement is

The principle underlying the rule excluding evidence

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The question as to the admissibility of evidence as to a settlement made with a third person involved in the same conduct was considered in the comparatively recent case of Will v. Miles, 309 Ill. 404, 321 Ill. 332-332. There the court said at pp. 332-332:

"The question has been fully considered by the courts of highest authority in a number of other jurisdictions and it has been generally held that evidence of settlements made with third parties involved in the same accident is inadmissible. *** The Illinois courts have consistently refused to permit evidence of such offers and no objection for settlement to be taken on the ground that public policy favors the settlement of claims out of court. (Cohn v. Cople, 37 Ill. App. 2d 117, 118 N.E.2d 117, 118 N.E.2d 118, 119 N.E.2d 119, 120 N.E.2d 120, 121 N.E.2d 121, 122 N.E.2d 122, 123 N.E.2d 123, 124 N.E.2d 124, 125 N.E.2d 125, 126 N.E.2d 126, 127 N.E.2d 127, 128 N.E.2d 128, 129 N.E.2d 129, 130 N.E.2d 130, 131 N.E.2d 131, 132 N.E.2d 132, 133 N.E.2d 133, 134 N.E.2d 134, 135 N.E.2d 135, 136 N.E.2d 136, 137 N.E.2d 137, 138 N.E.2d 138, 139 N.E.2d 139, 140 N.E.2d 140, 141 N.E.2d 141, 142 N.E.2d 142, 143 N.E.2d 143, 144 N.E.2d 144, 145 N.E.2d 145, 146 N.E.2d 146, 147 N.E.2d 147, 148 N.E.2d 148, 149 N.E.2d 149, 150 N.E.2d 150, 151 N.E.2d 151, 152 N.E.2d 152, 153 N.E.2d 153, 154 N.E.2d 154, 155 N.E.2d 155, 156 N.E.2d 156, 157 N.E.2d 157, 158 N.E.2d 158, 159 N.E.2d 159, 160 N.E.2d 160, 161 N.E.2d 161, 162 N.E.2d 162, 163 N.E.2d 163, 164 N.E.2d 164, 165 N.E.2d 165, 166 N.E.2d 166, 167 N.E.2d 167, 168 N.E.2d 168, 169 N.E.2d 169, 170 N.E.2d 170, 171 N.E.2d 171, 172 N.E.2d 172, 173 N.E.2d 173, 174 N.E.2d 174, 175 N.E.2d 175, 176 N.E.2d 176, 177 N.E.2d 177, 178 N.E.2d 178, 179 N.E.2d 179, 180 N.E.2d 180, 181 N.E.2d 181, 182 N.E.2d 182, 183 N.E.2d 183, 184 N.E.2d 184, 185 N.E.2d 185, 186 N.E.2d 186, 187 N.E.2d 187, 188 N.E.2d 188, 189 N.E.2d 189, 190 N.E.2d 190, 191 N.E.2d 191, 192 N.E.2d 192, 193 N.E.2d 193, 194 N.E.2d 194, 195 N.E.2d 195, 196 N.E.2d 196, 197 N.E.2d 197, 198 N.E.2d 198, 199 N.E.2d 199, 200 N.E.2d 200, 201 N.E.2d 201, 202 N.E.2d 202, 203 N.E.2d 203, 204 N.E.2d 204, 205 N.E.2d 205, 206 N.E.2d 206, 207 N.E.2d 207, 208 N.E.2d 208, 209 N.E.2d 209, 210 N.E.2d 210, 211 N.E.2d 211, 212 N.E.2d 212, 213 N.E.2d 213, 214 N.E.2d 214, 215 N.E.2d 215, 216 N.E.2d 216, 217 N.E.2d 217, 218 N.E.2d 218, 219 N.E.2d 219, 220 N.E.2d 220, 221 N.E.2d 221, 222 N.E.2d 222, 223 N.E.2d 223, 224 N.E.2d 224, 225 N.E.2d 225, 226 N.E.2d 226, 227 N.E.2d 227, 228 N.E.2d 228, 229 N.E.2d 229, 230 N.E.2d 230, 231 N.E.2d 231, 232 N.E.2d 232, 233 N.E.2d 233, 234 N.E.2d 234, 235 N.E.2d 235, 236 N.E.2d 236, 237 N.E.2d 237, 238 N.E.2d 238, 239 N.E.2d 239, 240 N.E.2d 240, 241 N.E.2d 241, 242 N.E.2d 242, 243 N.E.2d 243, 244 N.E.2d 244, 245 N.E.2d 245, 246 N.E.2d 246, 247 N.E.2d 247, 248 N.E.2d 248, 249 N.E.2d 249, 250 N.E.2d 250, 251 N.E.2d 251, 252 N.E.2d 252, 253 N.E.2d 253, 254 N.E.2d 254, 255 N.E.2d 255, 256 N.E.2d 256, 257 N.E.2d 257, 258 N.E.2d 258, 259 N.E.2d 259, 260 N.E.2d 260, 261 N.E.2d 261, 262 N.E.2d 262, 263 N.E.2d 263, 264 N.E.2d 264, 265 N.E.2d 265, 266 N.E.2d 266, 267 N.E.2d 267, 268 N.E.2d 268, 269 N.E.2d 269, 270 N.E.2d 270, 271 N.E.2d 271, 272 N.E.2d 272, 273 N.E.2d 273, 274 N.E.2d 274, 275 N.E.2d 275, 276 N.E.2d 276, 277 N.E.2d 277, 278 N.E.2d 278, 279 N.E.2d 279, 280 N.E.2d 280, 281 N.E.2d 281, 282 N.E.2d 282, 283 N.E.2d 283, 284 N.E.2d 284, 285 N.E.2d 285, 286 N.E.2d 286, 287 N.E.2d 287, 288 N.E.2d 288, 289 N.E.2d 289, 290 N.E.2d 290, 291 N.E.2d 291, 292 N.E.2d 292, 293 N.E.2d 293, 294 N.E.2d 294, 295 N.E.2d 295, 296 N.E.2d 296, 297 N.E.2d 297, 298 N.E.2d 298, 299 N.E.2d 299, 300 N.E.2d 300, 301 N.E.2d 301, 302 N.E.2d 302, 303 N.E.2d 303, 304 N.E.2d 304, 305 N.E.2d 305, 306 N.E.2d 306, 307 N.E.2d 307, 308 N.E.2d 308, 309 N.E.2d 309, 310 N.E.2d 310, 311 N.E.2d 311, 312 N.E.2d 312, 313 N.E.2d 313, 314 N.E.2d 314, 315 N.E.2d 315, 316 N.E.2d 316, 317 N.E.2d 317, 318 N.E.2d 318, 319 N.E.2d 319, 320 N.E.2d 320, 321 N.E.2d 321, 322 N.E.2d 322, 323 N.E.2d 323, 324 N.E.2d 324, 325 N.E.2d 325, 326 N.E.2d 326, 327 N.E.2d 327, 328 N.E.2d 328, 329 N.E.2d 329, 330 N.E.2d 330, 331 N.E.2d 331, 332 N.E.2d 332, 333 N.E.2d 333, 334 N.E.2d 334, 335 N.E.2d 335, 336 N.E.2d 336, 337 N.E.2d 337, 338 N.E.2d 338, 339 N.E.2d 339, 340 N.E.2d 340, 341 N.E.2d 341, 342 N.E.2d 342, 343 N.E.2d 343, 344 N.E.2d 344, 345 N.E.2d 345, 346 N.E.2d 346, 347 N.E.2d 347, 348 N.E.2d 348, 349 N.E.2d 349, 350 N.E.2d 350, 351 N.E.2d 351, 352 N.E.2d 352, 353 N.E.2d 353, 354 N.E.2d 354, 355 N.E.2d 355, 356 N.E.2d 356, 357 N.E.2d 357, 358 N.E.2d 358, 359 N.E.2d 359, 360 N.E.2d 360, 361 N.E.2d 361, 362 N.E.2d 362, 363 N.E.2d 363, 364 N.E.2d 364, 365 N.E.2d 365, 366 N.E.2d 366, 367 N.E.2d 367, 368 N.E.2d 368, 369 N.E.2d 369, 370 N.E.2d 370, 371 N.E.2d 371, 372 N.E.2d 372, 373 N.E.2d 373, 374 N.E.2d 374, 375 N.E.2d 375, 376 N.E.2d 376, 377 N.E.2d 377, 378 N.E.2d 378, 379 N.E.2d 379, 380 N.E.2d 380, 381 N.E.2d 381, 382 N.E.2d 382, 383 N.E.2d 383, 384 N.E.2d 384, 385 N.E.2d 385, 386 N.E.2d 386, 387 N.E.2d 387, 388 N.E.2d 388, 389 N.E.2d 389, 390 N.E.2d 390, 391 N.E.2d 391, 392 N.E.2d 392, 393 N.E.2d 393, 394 N.E.2d 394, 395 N.E.2d 395, 396 N.E.2d 396, 397 N.E.2d 397, 398 N.E.2d 398, 399 N.E.2d 399, 400 N.E.2d 400, 401 N.E.2d 401, 402

made with a third party. A person making such a settlement should not be required to explain his conduct before a jury where apart from the mere act of payment there is no other act or statement on his part which could be construed as an admission of liability. If such evidence is not excluded and is allowed to go to the jury it may be extremely prejudicial even where an explanation is made showing that the only purpose of the payment was to avoid litigation without reference to the question of liability."

In Powers v. Wiley, 241 Ky. 645, 44 S. W. (2nd) 591, the court said at p. 592 of the last mentioned report:

"The rule is well settled that, if in the same accident two or more persons are injured, a compromise with one cannot be shown in an action by the other. 22 C. J., p. 320, sec. 354, note B, and cases cited; Ferry's Adm'r v. Louisville Railway Co., 165 Ky. 747, 178 S. W. 1087. The reason for the rule is that the law favors the settlement of controversies out of court, and, if a man could not settle one claim out of court without fear that this would be used in another suit as an admission against him, many settlements would not be made. For this reason, offers of compromise are always held inadmissible, and for the same reason a man's buying his peace from one party can no more be used against him in the suit of another party than the defendant could use the settlement against the plaintiff in the action to reduce his recovery if for only a nominal amount."

We have made an extensive search of authorities in numerous other jurisdictions which support the general rule and we have been unable to find in any of them that any differentiation was made as to the purpose for which the evidence of settlement with a third person injured in the same accident was offered. Regardless of the guise under which such evidence is sought to be presented before a jury, it is "inherently harmful," as was said by Mr. Justice Lamar in Georgia Ry. & Elec. Co. v. Wallace & Co., supra, and it may be extremely prejudicial "in spite of anything which may be said by the judge in instructing them as to the weight to be given such evidence."

Although the trial judge properly sustained objections to the questions asked by plaintiff's attorney in relation to the settlement and directed the jury to disregard them, said attorney accomplished his object by apprising the jury by inference as to the settlement by merely asking the questions. Counsel's

made with a third party. A person making such a settlement should not be required to explain his conduct before a jury where apart from the mere fact of payment there is no other act or statement on his part which could be considered as an admission of liability. If such evidence is not excluded and is allowed to go to the jury it may be extremely prejudicial even where an explanation is made showing that the only purpose of the payment was to avoid litigation without reference to the question of liability."

In *Lawrence v. Allen*, 241 Ky. 645, 46 S. W. (2d) 101,

the court said at p. 102 of the last mentioned report:

"The rule is well settled that, if in the same accident two or more persons are injured, a compromise with one cannot be shown in an action by the other. 22 U. T. p. 300, sec. 324, note B, and cases cited; *Yerry's Dam v. Louisville Railway Co.*, 100 Ky. 178, 179 S. W. 1087. The reason for the rule is that the law favors the settlement of controversies out of court, and if a man could not settle one claim out of court without fear that this would be used in another suit as an admission against him, many settlements would not be made. For this reason, offers of compromise are always held inadmissible, and for the same reason a man's paying his price from one party can no more be used against him in the suit of another party than the defendant could use the settlement against the plaintiff in the action to reduce his recovery if for only a nominal amount."

We have made an extensive search of authorities in numerous

other jurisdictions which support the general rule and we have been unable to find in any of them that any different rule was made as to the purpose for which the payment of settlement with a third person injured in the same accident was offered. Regarding the rule of the case under which such evidence is sought to be presented before a jury, it is "inherently harmful," as was said

by Mr. Justice Lamm in *People v. Allen*, 300 N. Y. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

which may be said by the jury in instructing them as to the weight to be given such evidence."

Although the trial judge properly sustained objections to the questions asked by Plaintiff's attorney in relation to the settlement and directed the jury to disregard them, said attorney accomplished his object by appearing the jury by inference as to the settlement by merely asking the questions. Counsel's

reference to the settlement could not be erased from the minds of the jurors or cured by proper rulings or instructions of the court. Where, as here, counsel suggests facts in questions and in his argument to the jury not proven by the evidence, which are calculated to prejudice the jurors in their consideration of the case, it is the duty of the court for that reason alone to interpose and prevent the success of such methods by setting aside the verdict.

For the reasons stated herein the judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED FOR NEW TRIAL.

Friend, P. J., and Scanlan, J., concur.

reference to the settlement could not be traced from the
 mind of the jurors or could by proper rulings on instructions
 of the court. Where, as here, counsel suggests facts
 in questions and in his argument to the jury not proven by
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 court for that reason alone to interfere and prevent the
 success of such methods by setting aside the verdict.

For the reasons stated herein the judgment of the
 Superior court of Cook county is reversed and the cause
 is remanded for a new trial.

JUDGMENT REVERSED AND
 CAUSE REMANDED FOR NEW TRIAL.

Witness, J. J. and so signed, J. J. Conant.

43586

JACOB SIEGEL and LENA
SIEGEL,
Appellees,

v.

DAVID J. DAVIS and
SELMA BLOCH,
Appellants.

168 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

328 I.A. 132

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiffs, Jacob Siegel and Lena Siegel, to recover from the defendants, David J. Davis and Selma Bloch, possession of the first apartment in the building located at 1508 South Kildare avenue, Chicago, Illinois. After trial without a jury the court entered a judgment order which found that plaintiffs were entitled to the possession of the premises in question and directed that a writ of restitution issue for the removal of the defendants therefrom. Defendants appeal from said judgment order.

Plaintiffs purchased the property involved herein on November 1, 1944. This property was improved with an apartment building, the first apartment in which was occupied by defendants under a written lease for one year which expired on April 30, 1945. Before plaintiffs could institute this action it was necessary that they secure from the Rent Director what is commonly referred to as a "Certificate of Eviction" in compliance with the Rent Regulations promulgated by the Office of Price Administration for the Chicago Defense ^{Rental} Area pursuant to the provisions of the Emergency Price Control Act (56 Stat. chap. 26, 50 U. S. C. A., Appendix, section 921). On January 27, 1945 a "Certificate of Eviction" pertaining to the apartment in question was issued to plaintiffs by the Rent Director of the Office of Price Administration and a

323 I.A. 132

ALLIANCE FOR THE PEOPLE

COURT OF THE U.S.

JAMES H. HARRIS and
JAMES H. HARRIS, Jr.,
Appellants,

DAVID J. DAVIS and
MELBA HARRIS,
Appellants.

Plaintiffs purchased the property involved herein on November 1, 1944. This property was involved with an apartment building, the first apartment in which was occupied by defendants under a written lease for one year which expired on April 30, 1945. Before plaintiffs could institute this action it was necessary that they secure from the Rent Director what is commonly referred to as a "Certificate of Violation" in compliance with the Rent Regulations promulgated by the Office of Price Administration for the Chicago Defense Rental Area pursuant to the provisions of the Emergency Price Control Act (50 Stat. chap. 20, 40 U. S. C. A., Appendix, section 201). On January 17, 1945 a "Certificate of Violation" pertaining to the apartment in question was issued to plaintiffs by the Rent Director of the Office of Price Administration and a

judgment order. The defendants appeal from said judgment order. This action was brought by plaintiffs, James H. Harris and James H. Harris, Jr., to recover from the defendants, David J. Davis and Melba Harris, possession of the first apartment in the building located at 1508 South Michigan Avenue, Chicago, Illinois. After trial without a jury the court entered a judgment order which found that plaintiffs were entitled to the possession of the premises in question and directed that a writ of restitution issue for the removal of the defendants therefrom. Defendants appeal from said judgment order.

copy of same was sent to defendants. The certificate contained the following, among other conditions:

"This certificate only authorizes an action to be brought for the eviction or removal of the tenant instituted in accordance with the requirements of local law and does not pass upon the merits of such action under such law.

"Subject to existing lease if any."

On May 1, 1945, the day after the expiration of defendants' written lease, they paid plaintiffs \$50 rent for the month of May, 1945, which was the amount of rent stipulated in said lease, and they received a receipt therefor. Defendants also paid plaintiffs \$50 rent for the apartment for June and July, 1945 and tendered the rent for August, which was not accepted. On the reverse side of the receipt which Jacob Siegel gave defendants for the June rent he wrote: "For month to month tenancy." On June 28, 1945 Jacob Siegel served a written notice on defendants that their tenancy "will terminate on the 31st day of July, 1945" and demanded therein that possession of the premises be surrendered on that day. Defendants refused to surrender possession of the apartment and plaintiffs brought this forcible detainer action on August 1, 1945.

Plaintiff, Jacob Siegel, testified in substance that he listed the property for sale with real estate brokers shortly after he received the "Certificate of Eviction" from the Rent Director in January, 1945 and that it continued to be so listed until June 1, 1945; that the only reason he permitted defendants to remain in the apartment after May 1, 1945 was because they told him on that day and on many occasions prior thereto as well as after that time that they could not find another apartment and requested additional time to find one.

Three witnesses testified on defendants' behalf - the defendants themselves, David J. Davis and Selma Bloch,

copy of same was sent to defendants. The certificate contain-

ed the following, among other conditions:

"This certificate only authorizes an action to be brought for the eviction or removal of the tenant installed in accordance with the requirements of local law and does not pass upon the merits of such action under such law."

"Subject to existing lease if any."

On May 1, 1945, the day after the expiration of a lease-

ants' written lease, they paid Plaintiff's \$20 rent for the

month of May, 1945, which was the amount of rent stipulated

in said lease, and they received a receipt therefor. Defend-

ants also paid Plaintiff's \$20 rent for the apartment for June

and July, 1945 and tendered the rent for August, which was

not accepted. On the reverse side of the receipt which Jacob

Siegel gave defendants for the June rent he wrote: "Ten month

to month tenancy." On June 25, 1945 Jacob Siegel served a

written notice on defendants that their tenancy "will terminate

on the 31st day of July, 1945" and demanded therein that posses-

sion of the premises be surrendered on that day. Defendants

refused to surrender possession of the apartment and plain-

tiffs brought this forcible detainer action on August 1, 1945.

Plaintiff, Jacob Siegel, testified in substance that he

listed the property for sale with real estate brokers shortly

after he received the "Certificate of Eviction" from the Rent

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they told him on that day and on many occasions prior thereto

as well as after that time that they could not find another

apartment and requested additional time to find one.

Three witnesses testified on defendants' behalf - the

defendants themselves, David J. Davis and Selma Bloch.

his daughter, and the latter's husband, Irwin D. Bloch.

Davis testified in substance that plaintiff, Jacob Siegel, told him in April, 1945 that he was disgusted with the building and asked him if he wanted to buy it; that Siegel said that he only wanted to make \$2,000 profit out of it; that Siegel also told him that he had listed the property for sale and that we would not have to move when our lease expired; and that during April and May real estate brokers brought numerous prospective purchasers to the building.

Irwin D. Bloch testified that in April, 1945 he heard Jacob Siegel tell his wife in their kitchen that defendants would not have to move because he was going to sell the property, that he was disgusted with the property and did not want it and that they could forget anything he had theretofore said about moving.

Selma Bloch testified that sometime in January, 1945 Siegel came to her home and told her that he wanted the flat; that he came to her home again in February and told her that he did not want the apartment inasmuch as he was going to sell the building; that he told her several times thereafter that they would not have to move because he was going to sell the building; that on May 1, 1945 he accepted from her the rent for the month of May and at that time the building was still listed for sale; that on June 1, 1945 he gave her a receipt for the June rent and made the notation on the reverse side thereof, "For month to month tenancy"; and that he then insisted for the first time since January 1945 that we move out of the apartment.

Defendants contend that "the acceptance of the May, 1945 rent after the expiration of the existing lease, without

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Davis testified in substance that plaintiff, Jacob
his daughter, and the latter's husband, Irwin D. Bloch.

any new agreements being made, created a 'hold over' and became a tenancy from year to year" and that "a tenancy from year to year can not be terminated by the service of a thirty day demand notice but must be terminated in accordance with the statute which requires the service of a sixty day notice, in writing, within four months preceding the last sixty days of the year."

Plaintiffs' position is that "a month to month tenancy was created here, so that acceptance of the May, 1945, rent after the expiration of the existing lease did not create a holdover so as to become a tenancy from year to year, but created a month to month tenancy which was terminated by service of demand for possession on June 28, 1945, demanding possession of the premises on August 1, 1945."

In bringing this action it was necessary for plaintiffs to proceed in compliance with the Illinois statutory provisions pertaining to the institution and maintenance of a forcible detainer suit.

The only question presented for our determination is whether on and after May 1, 1945 defendants occupied the premises as tenants from year to year upon the same terms as provided in the original lease or whether they were merely tenants from month to month commencing on said date. There are certain settled principles of law and applicable statutory provisions that are controlling in our consideration of this question.

It has been repeatedly held that if a tenant under a demise for a year or more holds over at the end of his term without any new agreement with his landlord he will be treated as a tenant from year to year subject to the terms of the original lease. (Johnson v. Foreman, 40 Ill. App. 456; Hately v. Myers, 96 Ill. App. 217; Goldsborough v. Gable,

any new agreements being made, created a 'hold over' and became a tenancy from year to year" and that "a tenancy from year to year can not be terminated by the service of a thirty day notice and must be terminated in accordance with the statute which requires the service of a sixty day notice, in writing, within four months preceding the last sixty days of the year."

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It has been repeatedly held that if a tenant under a lease for a year or more holds over at the end of his term without any new agreement with his landlord he will be treated as a tenant from year to year subject to the terms of the original lease. (Johnson v. Foreman, 40 Ill. App. 456; Lately v. Wynn, 96 Ill. App. 217; Goldsborough v. Bable,

140 Ill. 269; Epostein v. Kuhn, 225 Ill. 115; Bell v. Groom, 224 Ill. App. 58; Cottrell v. Gerson, 296 Ill. App. 412.)

Section 5 of the Landlord and Tenant Act (par. 5, chap. 80, Ill. Rev. Stat. 1943) provides as follows:

"In all cases of tenancy from year to year, sixty day notice, in writing, shall be sufficient to terminate the tenancy at the end of the year. The notice may be given at any time within four months preceding the last 60 days of the year."

A tenancy from year to year can only be terminated by notice in writing in accordance with the foregoing statutory requirements and if it is not so terminated, an action of forcible detainer cannot be maintained. (Streit v. Fay, 230 Ill. 319; Bell v. Groom, 224 Ill. App. 58.)

If it is shown that a month to month tenancy was created by a new agreement between the landlord and tenant to become effective upon the expiration of the lease, then a 30 day notice in writing is sufficient to terminate such tenancy.

The finding and judgment of the trial court were based solely upon the uncorroborated testimony of plaintiff, Jacob Siegel. After admitting that he had accepted \$50 from defendants on May 1, 1945, the day after the lease expired, for the May rent and gave them a receipt therefor, he stated that at that time he advised the defendant, Selma Bloch, that he wanted the apartment but that he permitted the defendants to continue in possession thereof because they told him that they could not find another apartment. Siegel did not testify nor can it be reasonably inferred from his testimony that on May 1, 1945 or prior thereto he made any new agreement with defendants in respect to the nature of their tenancy commencing on said date. It was only after his attorney learned that Siegel had accepted the May rent and permitted defendants to remain in possession of the premises without making a new

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140 Ill. 203; Levin v. Levin, 111 Ill. 119; Beil v. Green,
 124 Ill. 201; Watt v. Green, 230 Ill. 412.
 Section 7 of the Landlord and Tenant Act (par. 7, chap.
 80, Ill. Rev. Stat. 1943) provides as follows:

"In all cases of tenancy from year to year, sixty day
 notice, in writing, shall be sufficient to terminate the
 tenancy at the end of the year. The notice may be given
 at any time within four months preceding the last 60 days
 of the year."

A tenancy from year to year can only be terminated by
 notice in writing in accordance with the foregoing statutory
 requirements and if it is not so terminated, an action of
 forcible detainer cannot be maintained. (Beil v. Ray, 230
 Ill. 219; Beil v. Green, 234 Ill. 412.)

It is shown that a month to month tenancy was created
 by a new agreement between the landlord and tenant to become
 effective upon the expiration of the lease, then a 30 day
 notice in writing is sufficient to terminate such tenancy.
 The finding and judgment of the trial court were based
 solely upon the uncorroborated testimony of plaintiff, Jacob
 Stigel. After admitting that he had accepted \$20 from defend-
 ants on May 1, 1945, the day after the lease expired, for the
 May rent and gave them a receipt therefor, he stated that
 at that time he advised the defendant, Selma Bloch, that he
 wanted the apartment but that he permitted the defendants to
 continue in possession thereof because they told him that
 they could not find another apartment. Stigel did not testify
 nor can it be reasonably inferred from his testimony that
 on May 1, 1945 or prior thereto he made any new agreement with
 defendants in respect to the nature of their tenancy commencing
 on said date. It was only after his attorney learned that
 Stigel had accepted the May rent and permitted defendants to
 remain in possession of the premises without making a new

agreement with them as to their future occupancy of same that Siegel upon the advice of his lawyer made the notation, "For month to month tenancy," on the receipt that he gave them for the June rent. Siegel's attempt to create a tenancy for month to month or to furnish evidence of his intention to do so by the foregoing notation on the June rent receipt could not possibly serve to change the legal effect of plaintiffs' failure on or before May 1, 1945, when they accepted the May rent, to make a new agreement with defendants as to the nature of their tenancy upon the expiration of the term of their lease.

Since there is no evidence in the record which tends to show that plaintiffs made a new agreement with defendants that the latter were to occupy the premises as tenants from month to month upon the expiration of the term of their lease, we are impelled to hold that defendants held over as tenants from year to year, that plaintiffs' 30 day notice was insufficient to terminate such tenancy and that this action of forcible detainer cannot be maintained by them.

The judgment of the Municipal court of Chicago is reversed and judgment is entered here in favor of defendants and against plaintiffs.

JUDGMENT REVERSED AND JUDGMENT HERE.

Friend, P. J., and Scanlan, J., concur.

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that Siegel upon the advice of his lawyer made the
notation, "For month to month tenancy," on the receipt
that he gave them for the June rent. Siegel's attempt
to create a tenancy for month to month or to furnish
evidence of his intention to do so by the foregoing
notation on the June rent receipt could not possibly
serve to change the legal effect of plaintiffs' failure
on or before May 1, 1945, when they accepted the May rent,
to make a new agreement with defendants as to the nature
of their tenancy upon the expiration of the term of their
lease.

Since there is no evidence in the record which tends
to show that plaintiffs made a new agreement with defendants
that the latter were to occupy the premises as tenants from
month to month upon the expiration of the term of their
lease, we are impelled to hold that defendants held over as
tenants from year to year, that plaintiffs' 30 day notice
was insufficient to terminate such tenancy and that this
action of forcible detainer cannot be maintained by them.
The judgment of the Municipal Court of Chicago is
reversed and judgment is entered here in favor of defendants
and against plaintiffs.

JUDGMENT REVERSED AND JUDGMENT HERE.

THOMAS, P. J., and SCHMIDT, J., concur.

43524

EDWARD M. HART,
Appellee,

v.

FINLEY W. BROWN,
Appellant.

156 A
APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

328 I.A. 133

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 6, 1945, plaintiff brought an action of forcible detainer in the Municipal court of Chicago, against defendant, to recover possession of the first apartment of 1501 Juneway Terrace, Chicago. The case was heard before the court without a jury, there was a finding and judgment in plaintiff's favor and defendant appeals.

The record discloses that prior to May, 1942, plaintiff, who was then about 26 years of age, lived with his father, Erick Hart, and his mother in a 14-room residence at 1501 Juneway Terrace, Chicago. Some time thereafter, the family moved to 1425 Juneway Terrace and remodeled the 14-room residence into a 3-apartment building; a 5-room apartment on the first floor; a 4 or 5 room apartment on the second floor, (the evidence is not clear which) and a 2-room apartment in the basement. In the early part of 1942, defendant and his wife spoke to Erick Hart, about renting the first floor apartment and he agreed to do so for \$90 a month, and that he would prepare a written lease covering a period of two years. Defendant moved into the apartment in April, 1942. That afterward Erick gave a written lease and copy to defendant to execute and shortly thereafter, defendant signed the two and returned them to Erick Hart, according to defendant, within 20 days, but according to Erick, about

43224

EDWARD M. HART, Appellee,

v.

FRANK W. BROWN, Appellant.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

323 I.A. 133

MR. JUSTICE O'BONOR DELIVERED THE OPINION OF THE COURT.

April 8, 1942, plaintiff brought an action of forcible detainer in the Municipal Court of Chicago, against defendant, to recover possession of the first apartment of 1801 Juneway Terrace, Chicago. The case was heard before the court without a jury, there was a finding and judgment in plaintiff's favor and defendant appeals.

The record discloses that prior to May, 1942, plaintiff, who was then about 28 years of age, lived with his father, Erick Hart, and his mother in a 14-room residence at 1801 Juneway Terrace, Chicago. Some time thereafter, the family moved to 1425 Juneway Terrace and remodeled the 14-room residence into a 3-apartment building; a 3-room apartment on the first floor; a 4 or 5 room apartment on the second floor, (the evidence is not clear which) and a 2-room apartment in the basement. In the early part of 1942, defendant and his wife spoke to Erick Hart, about renting the first floor apartment and he agreed to do so for 20 a month, and that he would prepare a written lease covering a period of two years. Defendant moved into the apartment in April, 1942. That afterward Erick gave a written lease and copy to defendant to execute and shortly thereafter, defendant signed the two and returned them to Erick Hart, according to defendant, within 20 days, but according to Erick, about

2.

2 months after they had been delivered to defendant. The written lease was never executed by plaintiff or his father, or returned to defendant. The defendant moved into the apartment before the lease was prepared, occupying it continuously and paying the rent of \$90 per month by check to the father, Erick.

Mrs. Hart died in 1943 and plaintiff, her son, a bachelor, who had been living with his parents, moved with his father, Erick, to the apartment on the second floor at 1501 Juneway Terrace. In November, 1944, Erick remarried and about that time, asked defendant to vacate the apartment and to move upstairs in the apartment occupied by plaintiff and his father. The reason for this, as testified to by plaintiff, was that he had no bedroom in the apartment which he, his father and step-mother occupied and had to sleep on a couch, while the apartment on the first floor, where defendant lived, had two bedrooms. That defendant refused to exchange apartments on the ground that it was physically impossible for his wife and two children, ages one and three years, to move upstairs to the second floor apartment and that there was but one exit from that apartment. Afterward defendant's attention was called by Erick, to an available apartment at 5621 Kenmore avenue and to a house at 7043 North Mason avenue, but defendant rejected these properties because they were inconvenient.

Two notices were prepared by Erick Hart and served on defendant, demanding possession of the premises for Erick, and afterward a third notice was prepared, of like import, in the name of plaintiff and served on defendant and on the O. P. A. prior to the beginning of the suit. The evidence shows that plaintiff was the owner of the property; that on February 1, 1942, it was conveyed by warranty deed by Elin M. Nelson, a widow, to Esther D. Hart and Edward M. Hart, (Esther being Edward's mother) in joint tenancy, The deed was acknowledged

2 months after they had been delivered to defendant. The written lease was never executed by plaintiff or his father, or returned to defendant. The defendant moved into the apartment before the lease was prepared, occupying it continuously and paying the rent of \$80 per month by check to the father, Erick.

Mrs. Hart died in 1943 and plaintiff, her son, a bachelor, who had been living with his parents, moved with his father, Erick, to the apartment on the second floor at 1501 Broadway Terrace. In November, 1944, Erick remarried and about that time, asked defendant to vacate the apartment and to move upstairs in the apartment occupied by plaintiff and his father. The reason for this, as testified to by plaintiff, was that he had no bedroom in the apartment which he, his father and step-mother occupied and had to sleep on a couch, while the apartment on the first floor, where defendant lived, had two bedrooms. That defendant refused to exchange apartments on the ground that it was physically impossible for his wife and two children, ages one and three years, to move upstairs to the second floor apartment and that there was but one exit from that apartment. Afterward defendant's attention was called by Erick, to an available apartment at 5641 Kenmore avenue and to a house at 7043 North Mason avenue, but defendant rejected these properties because they were inconvenient.

Two notices were prepared by Erick Hart and served on defendant, demanding possession of the premises for Erick, and afterward a third notice was prepared, of like import, in the name of plaintiff and served on defendant and on the O. P. A. prior to the beginning of the suit. The evidence shows that plaintiff was the owner of the property; that on February 1, 1945, it was conveyed by warranty deed by Ellen M. Nelson, a widow, to Esther D. Hart and Edward M. Hart, (Esther being Edward's mother) in joint tenancy. The deed was acknowledged

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by the grantor on the day of its date and filed for record in the Recorder's Office of Cook county, February 13, 1941, so that after the death of the mother, the property was owned by plaintiff, her son, and that plaintiff's father had no interest in it except that he was occupying the apartment there, as above stated.

Counsel for defendant says that section 6(a) of the O. P. A. Act, which is applicable, provides that "Occupancy by landlord. The landlord owned, or acquired an enforceable right to buy or the right to possession of, the housing accommodations prior to the effective date of regulation (or prior to October 20, 1942 where the effective date of regulation is prior to that date, or prior to November 6, 1942 for housing accommodations with the Hastings Defense-Rental Area), and seeks in good faith to recover possession of such accommodations for immediate use and occupancy as a dwelling for himself." And it is agreed that plaintiff is not seeking to occupy the apartment for himself, but for his father, step-mother and himself and has not acted in good faith. This contention cannot be sustained. We think it is clear from all the evidence, that plaintiff wanted the apartment for himself, his father and his step-mother. And the fact that Erick, the father, gave two notices and served them on defendant, that he desired to occupy the premises, was in no way binding on anyone, because the property belonged to his son. The lease in which he was named the lessor was prepared by Erick and delivered to defendant. Erick testified that after he prepared the lease he delivered it to defendant who, sometime afterward signed it and returned it to Erick. This the record discloses, was after defendant moved into the apartment; that Erick and defendant met and it was orally agreed that the tenancy should be from month to month and therefore no written lease was necessary and that he

by the grantor on the day of its date and filed for record in the Recorder's Office of Cook County, February 13, 1941, so that after the death of the mother, the property was owned by plaintiff, her son, and that plaintiff's father had no interest in it except that he was occupying the apartment

there, as above stated.

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4.

afterward destroyed the lease and copy. This conversation is denied in toto by defendant. But we think this conflict in the testimony is in no way controlling for the reason that Erick did not own the property but it was owned by his son, the plaintiff.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and Niemeyer, J., concur.

afterward destroyed the lease and copy. This conversation
is denied in toto by defendant. But we think this conflict
in the testimony is in no way controlling for the reason
that Erick did not own the property but it was owned by his
son, the plaintiff.

The judgment of the Municipal court of Chicago is

affirmed.

JUDGMENT AFFIRMED.

Hatchett, P. J., and Niemeyer, J., concur.

43386

GEORGE W. SMITH, doing business
as PERFECT PEERLESS CALENDAR COMPANY,

Appellee,

v.

GEORGE J. BLOOM,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

328 I.A. 310

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On July 13, 1943 George W. Smith, doing business as Perfect Peerless Calendar Company, filed a four count complaint in the Superior Court of Cook County against George J. Bloom. The first count alleges that on or about September 29, 1942 defendant sold to plaintiff a 40-inch Sheridan Power Paper Cutter, with automatic clamp and motor; a Miller-Simplex Printing Press, with two motors; a Miller High-speed press with motor, for \$2,750; that defendant agreed to install the presses and other equipment in first class working condition in plaintiff's place of business; that plaintiff then paid to defendant \$1,000; that he thereafter paid to him an additional \$625; that he agreed to pay the balance of \$1,125 when the chattels were installed in first class working condition; that defendant warranted that the presses and cutter would operate in an efficient manner and for the purposes for which they were sold by defendant; that the presses and cutter were delivered; that they did not operate, perform, print or cut and were worthless and useless for the purposes for which they were purchased; that defendant, without success, attempted to repair them; that they were useless and of no value to plaintiff; and he asked damages in the sum of \$6,182.95. The second count alleges fraud and deceit. Count three alleges that defendant

GEORGE W. SMITH, doing business
as PERFECT PRESS AND CALENDER COMPANY,

APPEAL FROM

Appellee,

SUPERIOR COURT

v.

GEORGE J. BLOOM,

COOK COUNTY.

Appellant.

328 I.A. 310

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On July 13, 1943 George W. Smith, doing business as Perfect Press and Calender Company, filed a four count complaint in the Superior Court of Cook County against George J. Bloom.

The first count alleges that on or about September 29, 1942 defendant sold to plaintiff a 40-inch Sheridan Power Paper Cutter with automatic clamp and motor; a Miller-Simplex Printing Press, with two motors; a Miller High-speed press with motor, for \$2,750; that defendant agreed to install the presses and other equipment in first class working condition in plaintiff's place of business; that plaintiff then paid to defendant 1,000; that he thereafter paid to him an additional 525; that he agreed to pay the balance of 1,125 when the chastele were installed in first class working condition; that defendant warranted that the presses and cutter would operate in an efficient manner and for the purposes for which they were sold by defendant; that the presses and cutter were delivered; that they did not operate, perform, print or cut and were worthless and useless for the purposes for which they were purchased; that defendant, without success, attempted to repair them; that they were useless and of no value to plaintiff; and he asked damages in the sum of \$1,125.95. The second count alleges fraud and deceit. Count three alleges that defendant

caused to be issued by the clerk of the Circuit Court of Cook County a writ of replevin for the chattels in an action against Henry J. Volstad, Richard Roe and Mary Roe; that the sheriff took the chattels under the writ from plaintiff's premises and delivered them to defendant; that thereby defendant converted the chattels to his own use; that defendant unlawfully took possession of the chattels without the consent or knowledge of plaintiff and without making plaintiff a defendant in the replevin action. The fourth count is for money had and received. A motion to dismiss the complaint was overruled. Defendant, answering, joined issue as to the material allegations of the complaint. A trial before the court and a jury resulted in a verdict against defendant for \$4,000. Motions by defendant for a directed verdict, for judgment notwithstanding the verdict, for a new trial and in arrest of judgment, were overruled. On a remittitur of \$1,030 the court entered judgment on the verdict for \$2,970 and defendant appealed.

Plaintiff, George W. Smith, is in the business of selling printed calendar pads. He is 81 years of age and hard of hearing. He had at one time been in the printing business, but did not call himself a printer. He lets the printing of the calendar pads out on contract. He has been in that business for 21 years. He has an office at 176 West Adams Street, Chicago. He leases 90 square feet of space on the third floor at 637 South Dearborn Street, Chicago. Otto Regaer, a bookbinder and calendar manufacturer, and Clarence Mattson, a printer, under arrangements with plaintiff, occupied this third floor space (except an additional small office maintained by plaintiff), for use in their respective businesses.

It will be observed that the complaint alleges that the two printing presses and the cutter were sold by defendant to plaintiff on or about September 29, 1942 for \$2,750. The evidence, however, shows that the paper cutter and the Simplex press were purchased on September 29, 1942 or September 30, 1942 for \$2,750

caused to be issued by the clerk of the Circuit Court of Cook County a writ of replevin for the chattels in an action against Henry J. Volstead, Richard Roe and Mary Roe; that the sheriff took the chattels under the writ from plaintiff's premises and delivered them to defendant; that thereby defendant converted the chattels to his own use; that defendant unlawfully took possession of the chattels without the consent or knowledge of plaintiff and without making plaintiff a defendant in the replevin action. The fourth count is for money had and received. A motion to dismiss the complaint was overruled. Defendant, answering, joined issue as to the material allegations of the complaint. A trial before the court and a jury resulted in a verdict against defendant for \$4,000. Motions by defendant for a directed verdict, for judgment notwithstanding the verdict, for a new trial and in arrest of judgment, were overruled. On a remittitur of 1,000 the court entered judgment on the verdict for \$3,000 and defendant appealed. Plaintiff, George W. Smith, is in the business of selling printed calendar pages. He is 31 years of age and hard of hearing. He had at one time been in the printing business, but did not call himself a printer. He lets the printing of the calendar pages out on contract. He has been in that business for 31 years. He has an office at 178 West Adams Street, Chicago. He leases 20 square feet of space on the third floor at 637 South Dearborn Street, Chicago. Otto Regier, a bookbinder and calendar manufacturer, and Clarence Mattson, a printer, under arrangements with plaintiff, occupied this third floor space (except an additional small office maintained by plaintiff), for use in their respective businesses. It will be observed that the complaint alleges that the two printing presses and the cutter were sold by defendant to plaintiff on or about September 29, 1943 for \$2,750. The evidence, however, shows that the paper cutter and the simplex press were purchased on September 29, 1943 or September 30, 1943 for \$2,750

and that the Miller high speed press was purchased on October 29, 1942 for \$500. These were separate transactions in which the purchaser agreed to pay the aggregate sum of \$3,250. Defendant, George J. Bloom, had been in the printing machinery and financing business for 25 years, with an office at 188 West Randolph Street, Chicago. He had known plaintiff for 10 years, but had not sold him any printing machinery. Plaintiff testified that he was approached by the defendant with an offer to sell him the machinery and that defendant instructed Henry Volstad to go with plaintiff to inspect the machinery at a plant on the near north side of Chicago. Plaintiff testified further that after viewing the machinery, he purchased it; that defendant assured him that the presses and cutter were in good condition; that defendant agreed to deliver the chattels to the Dearborn Street plant; that after delivery plaintiff endeavored to get the press to operate; that it would not operate satisfactorily; that defendant sent men who endeavored to get the press to operate; and that despite these efforts the press was not put in condition to operate.

Defendant's position is that he sold the chattels to Henry Volstad; that plaintiff did not wish to be the purchaser; and that Volstad was supplied with the money paid on the purchase price on an arrangement between plaintiff and Volstad. The contention of defendant that he sold the chattels to Volstad is sustained by the evidence. The testimony of plaintiff that he was the purchaser is opposed by the overwhelming weight of the evidence. The paper cutter first viewed by plaintiff could not be procured by defendant and the latter substituted a different paper cutter. The paper cutter delivered, however, was satisfactory, as was the Miller high speed press. Plaintiff's asserted grievance is that the Simplex press did not operate in a satisfactory manner.

and that the Miller high speed press was purchased on October 29, 1942 for \$500. There were separate transactions in which the purchaser agreed to pay the aggregate sum of \$2,250. Defendant, George J. Bloom, had been in the printing machinery and financing business for 25 years, with an office at 182 West Randolph Street, Chicago. He had known plaintiff for 10 years, but had not sold him any printing machinery. Plaintiff testified that he was approached by the defendant with an offer to sell him the machinery and that defendant instructed Henry Volstad to go with plaintiff to inspect the machinery at a plant on the near north side of Chicago. Plaintiff testified further that after viewing the machinery, he purchased it; that defendant assured him that the presses and cutter were in good condition; that defendant agreed to deliver the chassis to the Dearborn Street plant; that after delivery plaintiff endeavored to set the press to operate; that it would not operate satisfactorily; that defendant sent men who endeavored to set the press to operate; and that despite these efforts the press was not put in condition to operate.

Defendant's position is that he sold the chassis to Henry Volstad; that plaintiff did not wish to be the purchaser; and that Volstad was supplied with the money paid on the purchase price on an arrangement between plaintiff and Volstad. The contention of defendant that he sold the chassis to Volstad is sustained by the evidence. The testimony of plaintiff that he was the purchaser is opposed by the overwhelming weight of the evidence. The paper cutter first viewed by plaintiff could not be produced by defendant and the latter substituted a different paper cutter. The paper cutter delivered, however, was satisfactory, as was the Miller high speed press. Plaintiff's asserted grievance is that the simplex press did not operate in a satisfactory manner.

Defendant, as vendor, and Volstad, as vendee, signed a conditional sales contract dated September 30, 1942 covering the sale of the cutter and the Simplex press for \$2,750. This contract acknowledged the receipt by vendor of \$1,000 in cash and therein the vendee promised to pay the balance of \$1,750 in four monthly installments beginning October 30, 1942, the first three installments being for \$500 each and the final installment for \$250. At the time of the execution of the conditional sales contract Volstad also delivered to defendant a promissory note for \$1,750, payable as agreed in the contract. On October 29, 1942 defendant, as vendor, and Volstad, as vendee, executed a conditional sales contract for the Miller high speed press, the purchase price being \$500. The contract acknowledged receipt of \$125 in cash and therein Volstad promised to pay the balance of \$375 in eight consecutive monthly installments beginning November 29, 1942, seven installments for \$50 each and the final installment for \$25. Volstad also executed a promissory note for \$375, payable as agreed in the contract. Plaintiff testified that he did not know about the conditional sales contracts. Plaintiff testified that on November 19, 1942, addressing defendant, he said: "I've got no receipt for what I've paid you. I've got nothing to show I paid you \$1,000 on this and when you get up the receipt you and Mr. Volstad give me the receipt for both and I'll give you \$500 more." Witness testified further that: "They wrote up the receipt and brought it in." The receipt, signed by defendant and dated November 19, 1942, reads: "Received from Perfect Peerless Calendar Company, on Sept. 29, 1942 One thousand dollars as first payment of \$2750, purchase price on one 44 inch Power paper cutter with automatic clamp and motor for same. Also one Miller Simplex printing press with two motors, D. C. current, both machines in good working order, delivered to 3rd floor at 637 Sou. Dearborn St.; Then few days later received One Hundred Dollars cash payment on a Miller High Speed press, price with motor

Dollars cash payment on a Miller High Speed press, price with motor \$375.00. Dearborn 25; Then few days later received One Hundred both machines in good working order, delivered to 3rd floor at one Miller Simplex printing press with two motors, D. C. current, Power paper cutter with automatic clamp and motor for same. Also dollars as first payment of \$275.00, purchase price on one 4 1/2 inch Perfect Presses Calender Company, on Sept. 29, 1942 One thousand by defendant and dated November 19, 1942, reads: "Received from "They wrote up the receipt and brought it in." The receipt, signed and I'll give you \$200 more." Witness testified further that: Get up the receipt you and Mr. Volstad give me the receipt for both I've got nothing to show I paid you \$1,000 on this and when you defendant, he said: "I've got no receipt for what I've paid you. contracts. Plaintiff testified that on November 19, 1942, addressing Plaintiff testified that he did not know about the conditional sales a promissory note for \$275, payable as agreed in the contract. \$50 each and the final installment for \$25. Volstad also executed installments beginning November 29, 1942, seven installments for promised to pay the balance of \$375 in eight consecutive monthly contract acknowledged receipt of \$125 in cash and therein Volstad the Miller high speed press, the purchase price being \$500. The and Volstad, as vendee, executed a conditional sales contract for as agreed in the contract. On October 29, 1942 defendant, as vendor, also delivered to defendant a promissory note for \$1,750, payable time of the execution of the conditional sales contract Volstad being for \$50 each and the final installment for \$250. At the installments beginning October 30, 1942, the first three installments the vendee promised to pay the balance of \$1,750 in four monthly acknowledged the receipt by vendor of \$1,000 in cash and therein sale of the cutter and the Simplex press for \$2,750. This contract conditional sales contract dated September 30, 1942 covering the Defendant, as vendor, and Volstad, as vendee, signed a

delivered to 3rd floor at 637 Sou. Dearborn St. \$500. with \$100. paid down; Balance on all machines to be paid in monthly payments of notes. Also, received today, Nov. 19th, 1942 \$525. cash to apply as second payment on the Miller Simplex and Sheridan Cutter now in use on 3rd floor at 637 Sou. Dearborn St. and proving very satisfactory in work. Also balance for moving \$50 and sales tax."

Although the receipt acknowledges that the payments were made by the plaintiff, it omits any reference to plaintiff as the purchaser. The statement in that receipt that "balance on all machines to be paid in monthly payments of notes", manifestly refers to the two notes executed by Volstad. Plaintiff did not sign any notes. The receipt sets out the terms of the two sales substantially as shown in the conditional sales contracts and strongly supports the position of defendant. The conditional sales contracts receipted for the down payments of \$1,000 and \$125. The receipt given to plaintiff on November 19, 1942 would be valuable to him as evidence of the payments made by him under whatever business arrangement he had with Volstad. Defendant and his witnesses testified that the receipt, except the clause acknowledging \$50 for moving and sales tax, was prepared by plaintiff on his typewriter and submitted to defendant for his signature.

The record shows that on November 19, 1942 plaintiff had paid on the cutter and the two presses and for moving and sales tax, the sum of \$1,675. As the total purchase price on the two transactions was \$3,250 and plaintiff paid defendant, to be credited to Volstad, \$1,625, there was a balance due to defendant from Volstad of \$1,625, excluding the item for moving and sales tax. Neither Volstad nor plaintiff made any attempt to pay any part of this balance. Plaintiff did not rescind either of the sales, nor did Volstad. When Volstad defaulted in paying the installment

delivered to 3rd floor at 827 5th, Dearborn St. \$500. with 100.
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 whatever business arrangement he had with Volstad. Defendant and
 his witnesses testified that the receipt, except the clause
 acknowledging \$50 for moving and sales tax, was prepared by plain-
 tiff on his typewriter and submitted to defendant for his signature.
 The record shows that on November 19, 1942 plaintiff
 had paid on the cutter and the two presses and for moving and sales
 tax, the sum of \$1,875. As the total purchase price on the two
 transactions was \$2,250 and plaintiff paid defendant, to be credited
 to Volstad, \$1,825, there was a balance due to defendant from
 Volstad of \$425, excluding the item for moving and sales tax.
 Neither Volstad nor plaintiff made any attempt to pay any part of
 this balance. Plaintiff did not receive either of the sales, nor
 did Volstad. When Volstad defaulted in paying the installment

notes, defendant approached plaintiff and gave him an opportunity to take over the conditional sales contracts and to pay the balances due thereon. This plaintiff declined to do. Defendant then requested that plaintiff permit him to repossess the chattels as provided in the conditional sales contracts. Plaintiff told him he could do so, but when defendant attempted to remove the chattels he was not permitted to take them. Thereupon, defendant brought a replevin action in the Circuit Court for the purpose of repossessing the chattels, naming as defendants, Henry J. Volstad, John Doe and Mary Roe. The Sheriff's return shows that he served the replevin writ on "George Herman Smith, herein named as John Doe," on March 23, 1943. The writ was served at plaintiff's premises on Dearborn Street and the chattels were taken from that location. The Circuit Court found that the right of possession to the chattels was in the plaintiff therein, George J. Bloom, and entered judgment accordingly. Plaintiff, Smith, knew that the chattels were taken from his premises on a replevin writ sued out by defendant. Nevertheless, he did not appear in that case or assert any right of ownership or possession in the chattels, nor did he attempt to set aside the judgment. According to plaintiff's theory, not having rescinded the sale, he was entitled to possession of the chattels. Assuming that he is right in his claim that the sale was to him and that there was a breach of warranty, he could have successfully resisted Bloom's replevin action by proving that he was the purchaser; that there was a breach of warranty; that he was damaged in an amount greater than the balance due on the purchase price; and that he was entitled to retain possession of the chattels. Under such an assumption he could also counterclaim against Bloom for whatever additional damages he could prove. His

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silence then is inconsistent with the position he now assumes. Four months after the chattels were repossessed he brought the instant action.

Defendant introduced testimony that the reason the Simplex press would not operate properly was because the temperature in the premises was 62 or 63 degrees, whereas the proper temperature for a pressroom is 80 degrees. Plaintiff did not introduce any countervailing testimony on this point. The testimony is undisputed that the press would not function properly at the temperatures maintained in the premises.

Count 1 of the complaint is founded upon a breach of warranty. The second count alleges fraud and deceit. This was stricken at the close of plaintiff's case. The third count is for a wrongful replevin and conversion of the machinery. No proof was submitted to support this count. The fourth count is for money had and received. As no rescission of the sale was alleged or proved and as plaintiff sought damages on the theory of ownership, there can be no recovery under that count. Plaintiff's case is based on the following clause of Sec. 69 of the Uniform Sales Act (Sec. 69, Ch. 121 $\frac{1}{2}$, Ill. Rev. Stat. 1945): "Where there is a breach of warranty by the seller, the buyer may, at his election * * * accept or keep the goods and maintain an action against the seller for damages for the breach of warranty." Under plaintiff's theory he kept the goods. There was no basis for a verdict for \$4,000. Plaintiff recognized this by consenting to a remittitur reducing the judgment to \$2,970. This amount represents \$1,625 paid on the purchase price of the chattels, \$50 moving expense and sales tax, and \$1,295 claimed by plaintiff to have been paid by him as penalties imposed by the Government

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 instant action.

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 simplex press would not operate properly was because the temper-
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 "Where there is a breach of warranty by the seller, the buyer may,
 at his election " * * * accept or keep the goods and maintain an
 action against the seller for damages for the breach of warranty."
 Under plaintiff's theory he kept the goods. There was no basis
 for a verdict for \$4,000. Plaintiff recognized this by consenting
 to a remittitur reducing the judgment to \$2,970. This amount
 represents \$1,825 paid on the purchase price of the castles,
 \$50 moving expense and sales tax, and \$1,825 claimed by plaintiff
 to have been paid by him as penalties imposed by the Government

because he defaulted in his contracts. The evidence does not show that any penalty payments to the Government were caused by the failure of the press to operate. Plaintiff asserted in his verified complaint that the penalties he was required to pay to the Government for failure to ship pads was \$205.45. Plaintiff did not make any attempt to prove the difference in the value of the Simplex press as delivered and as warranted.

We find that the judgment is contrary to the manifest weight of the evidence. The judgment of the Superior Court of Cook County is reversed and the cause remanded with directions to proceed in a manner not inconsistent with these views.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

KILEY, P.J. AND LEWE, J. CONCUR.

because he defaulted in his contracts. The evidence does not show

that any penalty payments to the Government were caused by the

failure of the press to operate. Plaintiff asserted in his

verified complaint that the penalties he was required to pay to

the Government for failure to ship orders was \$205.45. Plaintiff

did not make any attempt to prove the difference in the value of

the simplex press as delivered and as warranted.

We find that the judgment is contrary to the manifest

weight of the evidence. The judgment of the Superior Court of

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to proceed in a manner not inconsistent with these views.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

KILEY, P.J. AND LEWIS, J. CONCUR.

43660

In the Matter of THE PETITION OF
ANTHONY VOLPE TO BE ADMITTED A
CITIZEN OF THE UNITED STATES OF
AMERICA.

ANTHONY VOLPE,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

195 A
APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

328 I.A. 311

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Petitioner appeals from an order dismissing for want of jurisdiction his petition filed August 24, 1945 to set aside and expunge from the record an order entered April 3, 1920, vacating a prior order admitting petitioner to citizenship of the United States and directing that his petition for naturalization stand for further hearing, and an order entered March 28, 1924 on petitioner's motion, dismissing his petition for naturalization.

March 27, 1920 on petitioner's application for naturalization, filed pursuant to the federal act of 1906, an order was entered admitting petitioner to become a citizen of the United States, and a certificate of naturalization was issued. April 3, 1920, an order was entered reciting: "Upon further consideration of the above entitled petition, and the motion of the United States filed herein and the affidavit thereto attached, IT IS HEREBY ORDERED that the order of Court heretofore entered at this term of Court, on March 27, 1920, be vacated and set aside and that the petition stand for further hearing." This order further directed that the petitioner surrender the certificate of naturalization issued under the order vacated, and that the certificate be canceled. March 28, 1924, upon the

IN THE MATTER OF THE PETITION OF
ANTHONY VOLPE TO BE ADMITTED A
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AMERICA.

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Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

3281A.311

MR. JUSTICE NIENHUIS DELIVERED THE OPINION OF THE COURT.

Petitioner appeals from an order dismissing for want of jurisdiction his petition filed August 24, 1926 to set aside and expunge from the record an order entered April 3, 1920, vacating a prior order admitting petitioner to citizenship of the United States and directing that his petition for naturalization stand for hearing, and an order entered March 28, 1926 on petitioner's motion, dissolving his petition for naturalization.

March 27, 1920 on petitioner's application for naturalization, filed pursuant to the Federal act of 1906, an order was entered admitting petitioner to become a citizen of the United States, and a certificate of naturalization was issued. April 3, 1920, an order was entered reciting: "Upon further consideration of the above entitled petition, and the motion of the United States filed herein and the affidavits thereto attached, IT IS NOWBY ORDERED that the order of Court heretofore entered at this term of Court, on March 27, 1920, be vacated and set aside and that the petition stand for further hearing." This order further directed that the petitioner surrender the certificate of naturalization issued under the order vacated, and that the certificate be canceled. March 28, 1924, upon the

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motion of petitioner, his petition for naturalization was dismissed.

The petition filed August 24, 1945, on which the present proceeding is based, recites the issuance of a certificate of naturalization to petitioner on March 27, 1920 on the order mentioned above; that petitioner had no notice of the motion to vacate the order admitting him to citizenship, and that the order of April 3, 1920 was entered "without his being notified of same and without opportunity for a hearing on same"; that thereafter, "under misrepresentation made to him by representatives of the United States, whose names he does not now remember," as to the validity of the order of April 3, and under promises by the same representatives that a new certificate of naturalization would be issued on a further consideration of his petition, he surrendered his certificate of naturalization, and that thereafter, "on the 24th day of March 1924 under representations by representatives of the United States, whose names he does not now remember, falsely and fraudulently made, that (if) he would dismiss his said naturalization petition they would withdraw their objections to a later petition and would accept or consent to his later petition for naturalization at a later date; and your petitioner, relying on the aforesaid representations, and having full confidence in the representatives of the United States, and their expressed intention to assist him, made no inquiry or investigation to ascertain the truth, merit or validity or legality of the action suggested in the aforesaid representations, and he was persuaded to sign a request that his petition for naturalization be dismissed, and on March 28, 1924, on said request, of which motion and the making of same your petitioner had no notice and no opportunity for a hearing, he not being present or being represented in Court, an Order was entered in this Court by Judge Emanuel Eller dismissing your petitioner's petition for naturalization"; that the court was

motion of petitioner, his petition for naturalization was
dismissed.

The petition filed August 24, 1945, on which the present

proceeding is based, recites the issuance of a certificate
of naturalization to petitioner on March 27, 1930 on the order

mentioned above; that petitioner had no notice of the motion
to vacate the order admitting him to citizenship, and that the
order of April 3, 1930 was entered "without his being notified

of same and without opportunity for a hearing on same"; that
thereafter, "under misrepresentation made to him by representatives

of the United States, whose names he does not now remember," as
to the validity of the order of April 3, and under promises by
the same representatives that a new certificate of naturalization

would be issued on a further consideration of his petition, he
surrendered his certificate of naturalization, and that there-

after, "on the 24th day of March 1934 under representations by

representatives of the United States, whose names he does not
now remember, falsely and fraudulently made, that (1) he would

dismiss his said naturalization petition they could withdraw

their objections to a later petition and would accept or consent

to his later petition for naturalization at a later date; and

your petitioner, relying on the aforesaid representations, and

having full confidence in the representatives of the United

States, and their expressed intention to assist him, made no

inquiry or investigation to ascertain the truth, merit or

validity or legality of the action suggested in the aforesaid

representations, and he was persuaded to sign a request that his

petition for naturalization be dismissed, and on March 28, 1934,

on said request, of which motion and the making of same your

petitioner had no notice and no opportunity for a hearing, he

not being present or being represented in Court, an order was

entered in this Court by Judge Emanuel Miller dismissing your

petitioner's petition for naturalization"; that the court was

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without jurisdiction to enter the orders of April 3, 1920 and March 28, 1924, not only because of want of notice to petitioner of application for the orders and want of opportunity to be heard in opposition to their entry, but because the court had exhausted its jurisdiction by entry of the order of naturalization on March 27, 1920.

To this petition the respondent United States of America filed an answer denying that the court had jurisdiction over it, and asserting that the order of dismissal of petitioner's application for naturalization, entered on March 28, 1924, barred all right to relief. The answer further alleged that petitioner had actual notice of the motion to vacate the order of March 27, 1920 admitting him to citizenship. It denied the alleged representations and promises of the unnamed representatives of the United States and averred that on March 24, 1924 petitioner filed his motion to dismiss his petition for naturalization then pending, on which the court acted March 28, 1924; that thereafter on May 5, 1927 he filed a second petition for naturalization in the Superior court of Cook county, which petition was dismissed October 21, 1927 on his motion. The answer of respondent also sets up the 5 year limitation for correction of errors by motion, substituted for the writ of error coram nobis in section 72 of the Civil Practice Act. This objection need not be considered, as petitioner is not proceeding under that section of the statute. He says in his reply brief, "If the naturalization Court's vacating order is not void then appellant has no case."

Contrary to petitioner's contention, his application for naturalization was a judicial proceeding, subject to all the rules governing such proceedings, and the court in granting or refusing citizenship acted judicially. Tutun v. United States, 270 U. S. 568; In re Fordiani, 98 Conn. 435. Accordingly, the court retained jurisdiction of the subject matter and of petitioner until the expiration of the term of court at which the petitioner was

without jurisdiction to enter the orders of April 3, 1930 and March 28, 1934, not only because of want of notice to petitioner of application for the orders and want of opportunity to be heard in opposition to their entry, but because the court had expanded its jurisdiction by entry of the order of naturalization on March 27, 1930.

To this petition the respondent United States of America filed an answer denying that the court had jurisdiction over it, and asserting that the order of dismissal of petitioner's application for naturalization, entered on March 28, 1934, barred all right to relief. The answer further alleged that petitioner had actual notice of the motion to vacate the order of March 27, 1930 admitting him to citizenship. It denied the alleged representations and promises of the unnamed representatives of the United States and averred that on March 24, 1934 petitioner filed his motion to dismiss his petition for naturalization then pending, on which the court acted March 26, 1934; that thereafter on May 2, 1937 he filed a second petition for naturalization in the Superior Court of Cook County, which petition was dismissed October 21, 1937 on his motion. The answer of respondent also sets up the 5 year limitation for correction of errors by motion, substituted for the writ of error coram nobis in section 72 of the Civil Practice Act. This objection need not be considered, as petitioner is not proceeding under that section of the statute. He says in his reply brief, "If the naturalization Court's vacating order is not void then appellant has no case."

Contrary to petitioner's contention, his application for naturalization was a judicial proceeding, subject to all the rules governing such proceedings, and the court in granting or refusing citizenship acted judicially. Tinn v. United States, 270 U. S. 588; In re Forbani, 98 Conn. 455. Accordingly, the court retained jurisdiction of the subject matter and of petitioner until the expiration of the term of court at which the petitioner was

4.

admitted to citizenship, with full power to open up, vacate or modify any judgment entered. Brelsford v. Community High School Dist., 328 Ill. 27,^{30;} Krieger v. Krieger, 221 Ill. 479, 484.

By section 11 of the Naturalization act of 1906 the United States was authorized to appear in any naturalization proceeding and to be heard in opposition to the granting of any petition. The photostatic copy of the order admitting petitioner to citizenship bears the notation, "Admitted over objection of U. S. Examiner," and the order of April 3, 1920 vacating the order of admission recites that it was made on motion of the United States. The United States having appeared voluntarily under authority granted by Congress, it remained a party to the proceeding for all purposes, and since petitioner's present application is filed in the original naturalization proceeding, on the alleged ground that the orders sought to be vacated and expunged are void, the respondent is a necessary and proper party and its objection that the court is without jurisdiction of it is untenable.

The order of April 3, 1920 does not show notice to petitioner of respondent's motion. It does recite the filing of respondent's motion, with an affidavit attached thereto showing the presentation of a written motion. Neither the motion nor the affidavit are made a part of the record. Petitioner in his brief says that the record filed in this court "is the copy of everything in the records of this case on file with the Clerk of the Superior court of Cook county from the very beginning...." The attorney for respondent stated on oral argument that the written motion was missing from the files in the Superior court. The court will take judicial notice that notices of motions are frequently included in the same cover with the motion and supporting papers to which the notice refers. It was not necessary that the order should recite that notice was had on the petitioner. There is authority to the effect that a court may modify or vacate a final order within the term without notice. It is a

admitted to citizenship with full power to open up, vacate or
modify any judgment entered. Bretton v. Community High School
Dist., 328 Ill. 25, Kramer v. Kramer, 321 Ill. 473, 484.

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5.

general principle that where a court has jurisdiction over the person and subject matter, no error in the exercise of such jurisdiction can make the judgment void. 31 Am. Jur., Judgments, sec.

401. The rules of the Superior court required notice of motions. These rules have the same effect as statutes, and it is said to be the general rule that an order made without notice is void. 37 Am. Jur., Motions, Rules, and Orders, sec. 9. However, want of notice may be waived, as it goes merely to the jurisdiction of the person. 31 Am. Jur., Judgments, sec. 779. This waiver of notice may be made by appearing and arguing a motion on its merits without objecting to the failure to give notice. Toy v. Haskell, 128 Cal. 558.

Notice may also be waived by a subsequent appearance in court and recognizing the validity of the order entered on a motion made without notice. As said in Taylor Coal Co. v. Industrial Commission, 301 Ill. 381, 384, "The general rule as applied to courts is, that jurisdiction of the subject matter, - which means jurisdiction of the class of cases to which the particular case belongs and not jurisdiction of a case within such a class, - cannot be waived. The method by which jurisdiction of a particular case within the general class of cases is obtained, and any defects or irregularities in respect thereto, may be waived, and are waived unless seasonable objection is made in accordance with the established practice.

(O'Brien v. People, 216 Ill. 354; Franklin Union v. People, 220 id. 355.) Where a court has jurisdiction of the subject matter and may take jurisdiction of a particular case if certain conditions exist, and no objection is raised to the exercise of jurisdiction, as in case of a limitation barring a writ of error, an adequate remedy at law and the like, a party will be deemed to have waived the jurisdictional question. Burnap v. Wight, 14 Ill. 303; Stout v. Cook, 41 id. 447; Crawford v. Schmitz, 139 id. 564; Hauger v. Gage, 168 id. 365; Law v. Ware, 238 id. 360; Peterson v. Manhattan Life Ins. Co. 244 id. 329; People v. Evans, 262 id. 235."

General principle that where a court has jurisdiction over the person and subject matter, no error in its exercise of such jurisdiction can make the judgment void. 21 Am. Jur., Judgments, sec. 401. The rule of the objection cannot redress notice of motions. These rules have the same effect as statutes, and it is said to be the general rule that an order made without notice is void. 27 Am. Jur., Motion, Rules, and Orders, sec. 6. However, and if notice may be waived, as it goes merely to the jurisdiction of the person. 21 Am. Jur., Judgments, sec. 499. This waiver of notice may be made by appearing and arguing a motion on the merits without objecting to the failure to give notice. Toy v. Parkell, 128 Cal. 384. Notice may also be waived by a subsequent appearance in court and recognizing the validity of the order entered on a motion made without notice. As said in Taylor Coal Co. v. Industrial Commission, 301 Ill. 381, 384, "the general rule as applied to courts is, that jurisdiction of the subject matter, - which means jurisdiction of the class of cases to which the particular case belongs and not jurisdiction of a case within such a class, - cannot be waived. The method by which jurisdiction of a particular case within the general class of cases obtained, and any defects or irregularities in respect thereto, may be waived, and are waived unless reasonable objection is made in accordance with the established practice." (Citing v. Lewis, 116 Ill. 38; Franklin Union v. People, 280 Ill. 355.) Where a court has jurisdiction of the subject matter and may take jurisdiction of a particular case if certain conditions exist, and no objection is raised to the exercise of jurisdiction as in case of a limitation during a writ of error, an adequate remedy at law and the like, a party will be deemed to have waived the jurisdictional question. Wright v. Smith, 14 Ill. 383; Scott v. Cook, 41 Ill. 447; Quinlan v. Schuster, 128 Ill. 384; Parker v. Ward, 106 Ill. 385; Lee v. Ward, 238 Ill. 380; Peterson v. Richardson, 115 Ill. 381; Wolfe v. Wolfe, 132 Ill. 382.

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In the instant case petitioner's subsequent filing of a motion to dismiss his petition for naturalization was a recognition of the validity of the order of April 3, 1920 vacating the prior order of naturalization and continuing the application for naturalization for further hearing, and the order subsequently entered upon petitioner's motion cannot be questioned by him unless the facts set up in the petition now before us are sufficient to raise a question of fact as to his voluntary action in the matter, uninfluenced by fraud or misrepresentations binding the respondent. The petition wholly fails to make such showing. The alleged misrepresentations which petitioner urges as invalidating what appears upon the record as his voluntary action in dismissing his petition for naturalization, are said by him to have been made by representatives of respondent, whose names he does not now remember. Neither the identity or official capacity of the alleged wrongdoer nor his authority to bind the United States is shown. Furthermore, the action of the court could not be controlled by any agreement or recommendation of any representative of respondent, however high his official position. The action of petitioner in moving for dismissal of his petition must, upon the record, be construed as voluntary and therefore as waiving any want of notice of the motion to vacate the order of naturalization.

There is another objection to petitioner's claim of want of notice of this motion. The present petition was not filed until 1945, more than 25 years after the entry of the first order, and more than 21 years after petitioner's dismissal of his application. In 31 Am. Jur., Judgments, sec. 423, it is said, "The presumptions in favor of the regularity of a judgment become stronger with the lapse of years. It has even been said that almost any reasonable presumption of fact will be conclusively indulged in order to sustain rights asserted under a decree which is twenty years old."

In the instant case petitioner's subsequent filing of a motion to dismiss his petition for naturalization was a recognition of the validity of the order of April 3, 1920 vacating the prior order of naturalization and continuing the application for naturalization for further hearing, and the order subsequently entered upon petitioner's motion cannot be questioned by him unless the facts set up in the petition now before us are sufficient to raise a question of fact as to his voluntary action in the matter, unimpaired by fraud or misrepresentation binding the respondent. The petition wholly fails to make such showing.

The alleged misrepresentations which petitioner urges as invalidating what appears upon the record as his voluntary action in dismissing his petition for naturalization, are said by him to have been made by representatives of respondent, whose names he does not now remember. Neither the identity or official capacity of the alleged wrongdoer nor his authority to bind the United States is shown. Furthermore, the action of the court could not be controlled by any agreement or recommendation of any representative of respondent, however high his official position. The action of petitioner in moving for dismissal of his petition must, upon the record, be construed as voluntary and therefore as waiving any want of notice of the motion to vacate the order of naturalization.

There is another objection to petitioner's claim of want of notice of this motion. The present petition was not filed until 1945, more than 25 years after the entry of the first order, and more than 21 years after petitioner's dismissal of his application. In 21 Am. Jur., Judgments, sec. 423, it is said, "The presumption in favor of the regularity of a judgment become stronger with the lapse of years. It has even been said that almost any reasonable presumption of fact will be conclusively indulged in order to sustain rights asserted under a decree which is twenty years old."

(citing Thompson v. Thompson, 91 Ala. 591, and Copelan v. Kimbrough, 149 Ga. 683.) For more than 20 years petitioner has slept on his rights. The dismissal of his original petition did not bar subsequent applications for naturalization. If any obstacle to admission to citizenship arose subsequently, it could only have been through the conduct of petitioner. Vacation of the orders complained of would restore petitioner to a status he enjoyed not longer than a week, more than 25 years ago; make him a citizen of the United States and thereby enable him to avoid the consequences of his misconduct, if any, barring a present application for citizenship. Public policy requires that the status of an unnaturalized resident of the United States, in which petitioner has acquiesced for so many years, be continued until such time as the petitioner by a further application demonstrates his right to citizenship.

The order is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

(Citing Thompson v. Thompson, 21 Ala. 501, and Copelan v. Kimbrough, 148 Ga. 682.) For more than 20 years petitioner has slept on his rights. The dismissal of his original petition did not bar subsequent applications for naturalization. If any obstacle to admission to citizenship arose subsequently, it could only have been through the conduct of petitioner. Vacation of the orders could have been restored to a status he enjoyed not longer than a week, more than 25 years ago; make him a citizen of the United States and thereby enable him to avoid the consequences of his misconduct, if any, bearing a present application for citizenship. Public policy requires that the status of an unnaturalized resident of the United States, in which petitioner has resided for so many years, be continued until such time as the petitioner by a further application demonstrates his right to citizenship.

The order is affirmed.

AFFIRMED.

Matchett, J., and O'Connor, J., concur.

466-ILLINOIS APP.

1-328 Ill App Pt 3 61579 4-16 Mullen 8x10x23

Case 193

CASE-195

In re Petition of Anthony Volpe to be Admitted a
Citizen of the United States of America.
Anthony Volpe, Appellant, v. United States of
America, Appellee.

Gen. No. 43,660. (Abstract of Decision.)

ALIENS, § 8*—*when validity of order in naturalization proceedings was recognized by subsequent filing of motion.* Where petition was filed to set aside order vacating prior order admitting petitioner to citizenship, on ground that petitioner had no notice of motion to vacate order, and it appeared that about four years later petition for naturalization was dismissed upon motion of petitioner, held that subsequent filing of motion to dismiss his petition for naturalization was recognition of validity of order which petitioner sought to have set aside.

Appeal from the Superior Court of Cook county; the Hon. U. S. SCHWARTZ, Judge, presiding. Affirmed. Heard in the first division, first district, this court at the February term, 1946; opinion filed April 8, 1946. Guy C. Crapple, for appellant; J. Albert Woll, United States Attorney for Northern Dist. of Ill.; Antonio M. Gassaway and John Peter Lulinski, Assistant United States Attorneys, and Dewey G. Hutchinson, United States Naturalization Examiner, Dept. of Justice, Immigration and Naturalization Service. Opinion by JUSTICE NIEMEYER. Not to be published in full.

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General Number 9490.

Agenda Number 9.

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT
FEBRUARY TERM, A.D. 1946.

2/23/46

SILAS HAMMITT, : APPEAL FROM THE CIRCUIT COURT
Plaintiff-and Appellee, : OF LOGAN COUNTY.

-vs-

EMIL SANDEL, :
Defendant-and Appellant.:
HONORABLE FRANK S. BEVAN,
Judge Presiding.

328 I.A. 312

HAYES, P.J.:

Geraldine Justin Wager is the owner of 454 acres of farm land in Logan County Illinois, rented to Emil Sandel by written lease, on August 28, 1933, demising the premises for one year from March first, 1934. Sandel continued to farm the premises from that date without the execution of another lease. On December 26, 1944, Sandel ^{was} served with a written notice from Mrs. Wager terminating his tenancy on March 1, 1945. Subsequently the farm ^{was} rented to Silas Hammitt, who filed the present action of forcible entry and detainer in a justice court in Logan County on March 13, 1945 when Sandel refused to vacate the premises. A judgment in favor of Hammitt in that Court was appealed to the Circuit Court of Logan County and upon a trial without a jury, judgment was again rendered for plaintiff. Defendant has appealed to this court.

Sandel does not contend that the notice served upon him did not conform to the statute setting up the procedure for terminating a tenancy from year to year, ^{Ill. Rev Stat., 1945,} Ch. 80, Sec. 5, nor is there any doubt that subsequent to the expiration of

2.

the written lease Sandel occupied the premises as a tenant from year to year. Sandel's defense rests upon an alleged conversation which he testified took place between ^{him} ~~he~~ and his wife and Mr. & Mrs. Wager in July, 1937 or 1938. In substance, Sandel testified that Mrs. Wager told him "it was not necessary to ask for the farm each year as was his custom; that he replied that some agreement should be reached on the length of notice to be given should either of them desire a change; that he thought notice should be given in May or at least in July in order to terminate the tenancy the following March and that Mrs. Wager consented to this. Both Mr. & Mrs. Wager deny that the alleged conversation occurred. Evidence was introduced showing that Mr. Wager was in Cuba in July 1937 and that Mrs. Wager was in Europe during the entire summer of 1938.

Hammit contends that this oral agreement, if it was ever made, is void under the statute of frauds because it could not be performed within a year. The effectiveness of this argument depends on when the agreement was intended to take effect. Sandel testified: "I asked Mrs. Wager for the farm for the following year. I don't know the exact words, but in substance, she said I didn't have to ask for the farm every year, that I could go ahead and farm just as I had been doing. I said we ought to have an understanding in case either one or the other wanted to make a change, and that we should have an agreement when notice should be given and * * * that a tenant should know by May or at least by July the first *". It is apparent from this that Sandel understood he was to have possession of the farm from March 1, 1938 (assuming the agreement was made in 1937) to March 1, 1939, and that thereafter Mrs. Wager agreed to give him a longer notice than the sixty days permitted

the written lease stated according to the provisions as a tenant
two years to year. General's father wrote them an offer
conveyance which he accepted and which was
his wife and Dr. A. B. Jones in July, 1912, or 1913, in
substance, General testified that Dr. Jones told him it
was not necessary to fill out the lease which year he was
his father; that he replied that some agreement should be
reached on the length of notice to be given should either
of them desire a change. That he thought notice should be
given to say he is ready to take to order to terminate the
lease. The testimony which was that Dr. Jones demanded
to this, that Dr. A. B. Jones said that the agreement was
various occasions. Evidence was introduced showing that
Dr. Jones was in Cuba in July 1917 and that Dr. Jones was
in Europe during the whole summer of 1917.

General's testimony that this was completed, it is
not clear, in view of the state of facts because
it could not be reconciled with a fact. The statement
of this document showed in which the statement was included
to this effect, which testified: "I never saw, Jones for
the time for the following year. I heard from the other party
but in substance, she said I think I have to ask for the same
every year, that I could be asked and that as I had been
initial. I said we would go back to our relationship in order either
one or the other would be made a change, and that we should
have an agreement that notice should be given and a
that a tenant should know by way of an issue by July the 15th or
it is apparent from this that General understood he was to have
possession of the land from March 1, 1918 (beginning the agreement
was made in 1917) he would, I think, and that General's wife, Jones
would be give him a notice which the other party would

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by statute. This contract therefore could not take effect until after March 1, 1939 and thus could not be performed within a year from July, 1937. It is therefore void. Ill. Rev. Stat., ¹⁹⁴⁵ Ch. 59, Sec. 1.

The judgment of the Circuit Court of Logan County is affirmed.

JUDGMENT AFFIRMED.

by statute. This contract therefore would not take effect
until after March 1, 1920 and thus could not be performed
within a year from July, 1917. It is therefore void. III.
Gov. State, Ch. 20, Sec. 1.
The payment of the District Court of Lower Canada
is affirmed.

ORDER AFFIRMED.

The Court is of the opinion that the contract is void for the reasons stated above. The contract is not enforceable and the money paid thereunder is not recoverable. The Court therefore affirms the order of the District Court of Lower Canada.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

February Term, A. D. 1946

Gen. No. 9485

Agenda No. 5

CLARENCE E. YORDY,)
Plaintiff-Appellee,)
-vs-)
THE FARMERS AUTOMOBILE INSURANCE)
ASSOCIATION, a Reciprocal)
Insurance Exchange Organized and)
Existing Under the Statutes of)
the State of Illinois,)
Defendant-Appellant.)

Appeal from

Circuit Court

Tazewell County.

326 I.A. 312²

Dady, J.

This suit was brought in the Circuit Court of Tazewell County by Clarence E. Yordy, who is the plaintiff-appellee, against The Farmers Automobile Insurance Association, to recover \$750.00 which Yordy contributed to the association toward its settlement of a claim by Walter Wittmer against Yordy for personal injuries, the association having settled such claim by paying Wittmer \$3500. on January 7, 1939.

On October 24, 1936, there was a motor vehicle accident in which Wittmer received severe injuries. Thereafter he brought suit in said Circuit Court against Yordy and L. E. Sutter to recover for such injuries. At the time of the accident Yordy carried accident insurance in such association on his automobile. The association, through its attorney and in behalf of Yordy, duly defended such suit of Wittmer vs. Yordy, et al. On May 16, 1938, in such suit a jury returned a verdict of guilty against Yordy

Verdict

COURT OF ILLINOIS

APPELLATE COURT

February Term, A. D. 1944

Amended to 2

Gen. No. 4442

CLARENCE E. YORDY,
 Plaintiff-appellee,
 -vs-
 THE FARMERS AUTOMOBILE INSURANCE
 ASSOCIATION, a corporation,
 Insurance Exchange Corporation and
 Existing under the laws of
 the State of Illinois,
 Defendant-appellant.

Appeal from

Circuit Court

Tazewell County,

325 I.A. 812

Body, 1.

This suit was brought in the Circuit Court of Tazewell County by Clarence E. Yordy, who is the plaintiff-appellee, against The Farmers Automobile Insurance Association, to recover \$250.00 which Yordy contributed to the association toward its settlement of a claim by Walter Witter against Yordy for personal injuries, the association having settled such claim by paying Witter \$2500. on January 7, 1939.

On October 24, 1939, there was a motor vehicle accident in which Witter received severe injuries. Thereafter he brought suit in said Circuit Court against Yordy and the association to recover for such injuries. At the time of the accident Yordy carried accident insurance in such association on his automobile. The association, through its attorney and in behalf of Yordy, duly defended such suit of Witter vs. Yordy, et al. On May 18, 1939, in such suit a jury returned a verdict of guilty against Yordy

and assessed Wittmer's damages at \$10,000. Thereafter the association duly filed in said suit a motion for a judgment for Yordy notwithstanding the verdict, and an alternative motion for a new trial. Both motions were duly argued on June 28, 1938, before and taken under advisement by the trial court. Such motions were pending and undisposed of when the association made such settlement.

So far as is material, the insurance policy provided that the association agreed "to insure and indemnify" Yordy "in accordance with Schedule One by reason of any claim or demand * * * for which" Yordy "may be legally liable because of the ownership or use of an automobile * * * if caused as follows: * * * Claims Against The Assured * * * on account of bodily injuries to * * * one person, resulting from an accident of the automobile covered, * * * the liability of the association shall not exceed Five Thousand Dollars * * *. The association further agrees * * * to defend any suit brought against" Yordy "to recover damages on account of such accidents * * * where the judgment if rendered * * * would be covered by this policy." Yordy "shall not without written consent of the attorney in fact" of the association "previously given, voluntarily assume or admit any liability or settle any claim or incur any expenses, except at his own costs. The association reserves the right to settle any claim or suit at any time at its own cost."

After the return of the verdict in the suit of Wittmer v. Yordy and before such settlement was made, settlement negotiations were had between Yordy, Ralph Dempsey, who was the attorney for the insurance association, and Louis Knoblock, who was the attorney for Wittmer. On January 4, 1939, in a conference in Knoblock's office in Peoria, at which Knoblock, Yordy and Dempsey were present, a figure of \$3500. in settlement was agreed upon. On January 4,

and assessed witness's damages at \$10,000. Thereafter the association duly filed its claim with the court for a judgment for Yordy notwithstanding the verdict, and an alternative motion for a new trial. Both motions were duly argued on June 28, 1936, before and taken under advisement by the trial court. Such motions were pending and undisposed of when the association made such settlement.

So far as is material, the insurance policy provided that the association agreed "to insure and indemnify" Yordy "in accordance with the conditions by reason of any claim or demand * * * for which Yordy may be legally liable because of the ownership or use of an automobile * * * it contains as follows: * * * Claims Against The Assured * * * on account of bodily injuries to * * * one person, resulting from an accident of the automobile covered, * * * the liability of the association shall not exceed Five Thousand Dollars * * *. The association further agrees * * * to defend any suit brought against Yordy "to recover damages on account of such accidents * * * where the judgment is rendered * * * would be covered by this policy." Yordy "shall not without written consent of the attorney in fact" of the association "previously given, voluntarily assume or admit any liability or settle any claim or incur any expenses, except at his own costs. The association reserves the right to settle any claim or suit at any time at its own cost."

After the return of the verdict in the suit of *Wittner v. Yordy* and before such settlement was made, settlement negotiations were had between Yordy, Ralph Dempsey, who was the attorney for the insurance association, and Louis Knoblock, who was the attorney for Wittner. On January 4, 1936, in a conference in Knoblock's office in Detroit, at which Knoblock, Yordy and Dempsey were present, a figure of \$2000. in settlement was agreed upon. On January 4,

1939, Yordy purchased two bank drafts payable to his own order, one for \$850. and one for \$100. Thereafter on January 4th Yordy indorsed and delivered the drafts to a Mr. Jack, as manager of the association, which were cashed by the association. On January 7, 1939, the association obtained a release from Wittmer and gave its check for \$3500. in such settlement.

Thereafter Yordy brought this suit against the association. A jury returned a verdict for \$750. in favor of Yordy, on which the judgment appealed from was entered. The association brings this appeal.

The complaint, so far as is material charged that the defendant "made said settlement and stated to the plaintiff illegally, fraudulently, and deceitfully, by its statements, acts and conduct, required the plaintiff to pay the sum of \$750. toward said settlement, and that relying upon said statements and representations the plaintiff paid said sum to the" defendant.

The only contentions of the association can be summarized as being, (1), that the trial court erred in denying the motion for judgment notwithstanding the verdict, and that therefore the judgment should be reversed, and (2), that, in the alternative, the judgment should be reversed and the cause remanded for a new trial on the ground that the verdict was against the manifest weight of the evidence.

Counsel for appellee say in their brief, "To simplify the issues here, we are willing to confine this argument to the question of whether or not the defendant fraudulently induced and required plaintiff to pay the \$750. to be used by it in settling the case well below the policy limits." On such question only

1910, Fordy purchased two bank checks payable to his own order, one for \$500. and one for \$100. Thereafter on January 4th Fordy indorsed and delivered the checks to a Mr. Jack, an officer of the association, which were cashed by the association. On January 7, 1929, the association obtained a release from Witter and gave its check for \$350. in full settlement.

Thereafter Fordy brought this suit against the association. A jury returned a verdict for \$750. in favor of Fordy, on which the judgment appealed from was entered. The association brings this appeal.

The complaint, as far as it material appears that the defendant "made said defendant and stated to the plaintiff illegally, fraudulently, and deceitfully, by its statements, acts and conduct, induced the plaintiff to pay the sum of \$750. toward said settlement, and that relying upon said statements and representation the plaintiff paid said sum to the defendant."

The only contention of the association can be summarized as being, (1), that the trial court erred in denying the motion for judgment notwithstanding the verdict, and that therefore the judgment should be reversed, and (2), that, in the alternative, the judgment should be reversed and the cause remanded for a new trial on the ground that the verdict was against the manifest weight of the evidence.

Counsel for appellee say in their brief, "To simplify the issues here, we are willing to confine this argument to the question of whether or not the defendant fraudulently induced and required plaintiff to pay the \$750. to be used by it in settling the case well below the policy limits." On such question only

two witnesses testified for the plaintiff, viz, Yordy and Louis Knoblock. Knoblock was the attorney for Wittmer in both the trial and settlement of his case. On such question the only witnesses for the insurance association were Ralph Dempsey, M. A. D'Arcy, William Freitag, A. B. Ferdinand, and L. R. Robinson. Dempsey was general attorney for the association. D'Arcy was one of its attorneys. Dempsey and D'Arcy, as such attorneys, conducted the defense of the court proceedings in the Wittmer case. Dempsey conducted the negotiations relative to the settlement. Freitag was president and Robinson was a director of the association, and Ferdinand was in charge of its claim department.

Yordy testified that he was aged 31 years, had gone one year to high school and had always been a farmer; that shortly after the accident Dempsey told him the association would take care of everything and would protect him, and that he needed no attorney; that after the verdict Dempsey 'phoned him and told him there was a \$10,000 verdict against him; that on the same day he went to Dempsey's office in Pekin, Illinois; that Dempsey then said, "Clarence, we have a chance to settle this case for \$4,000. You have insurance for \$5,000 and you have a \$10,000 verdict, so you will owe one half of this and we will owe one-half. We are just like a team of horses hitched up together, you will have to pay your half and we will have to pay our half"; that he told Dempsey he couldn't raise \$2,000; that Dempsey then said, "We can take this case to a higher court and you will have to furnish a \$5,000 bond and we will have to furnish a \$5,000 bond. If you win you get your money back, and if you don't you lose your \$5,000 and we lose \$5,000"; that Dempsey asked him to come back the next day; that the next day

two witnesses testified for the plaintiff, viz, Verdy and Louis
Thompson. Thompson was the attorney for Miller in both the trial
and settlement of his case. On such occasion the only witnesses for
the insurance association were John Verdy, J. A. Brown, William
Fetlag, A. E. Davidson, and A. E. Davidson. Thompson was counsel
attorney for the association. Verdy was one of the attorneys.
Verdy and Brown, as such attorneys, conducted the defense of the
court proceedings in the Miller case. Verdy conducted the
negotiations relative to the settlement. Verdy was president and
Miller was a director of the association, and Davidson was in
charge of the claim department.

Verdy testified that he was aged 31 years, had come one year to
High school and had always been a farmer; that shortly after the
accident Verdy told him the association would take care of everything
and would protect him, and that he needed no attorney; that when the
verdict was given, Verdy told him that there was a 10% verdict
against him; that he was not to expect to get in
Verdy, Illinois; that Verdy told him, "Verdy, we have a
chance to settle this case for \$1,000. You have insurance for
\$5,000 and you have a 10% verdict, so you will get one half of
this and we will owe you nothing. We are just like a bank of
Verdy, Illinois; you will have to get your half and
we will have to pay our half"; that he told Verdy he could
raise \$2,000; that Verdy told him, "We can raise this case for a
higher amount and you will have to pay a 10% bond and we will
have to pay him a 10% bond. If you win you get your money back,
and if you don't you lose your 10% bond and we lose it, too"; that
Verdy asked him to come back the next day; that the next day

he went to Dempsey's office; that there was present Mr. Ferdinand, Mr. Jack, Mr. Dempsey and Yordy; that Dempsey brought out again that they were like a team of horses hitched together and that they owed half and Yordy's obligation was to raise \$2,000 and they would pay their \$2,000 because of the verdict; that one of the other gentlemen said, "Why Clarence, that's the law, you have got to pay half, you owe half of that. We are willing to pay our half, but you owe your half and you will have to pay your half"; that Yordy then told them that he couldn't pay it, and they asked him to come back again; that the next day he went to Dempsey's office and saw Dempsey alone; that Dempsey said, "We have talked this matter over and decided to pay \$2500. You say you can't raise it and we are going to go out of our way. We only owe half. We are going to go out of our way to please you, and we will pay this \$2500 if you can raise \$1500"; that he told Dempsey he couldn't do it; that Dempsey said, "Well, if you want to go over to Mr. Knoblock's office we will go there, and if he comes down any that will be your saving"; that the next day they met at Knoblock's office and at that time Dempsey said to Knoblock, "We have agreed to pay \$2500 for Clarence in this case. He can't raise the money and he owes half and the company owes half, but they are willing to pay \$2500." That Yordy then asked Knoblock what was the least he would take and he said \$3500; that when he got home he 'phoned for Dempsey, but Dempsey was not in so he talked to Mr. Jack, the manager of the association; that he said to Mr. Jack, "I suppose you heard we can settle this for \$3500 and I owe \$1,000. Would you be willing to pay \$500 more if I could raise \$500. I would try to raise \$500"; that Jack said, "No, we have done more than we

he went to Dempsey's office; that there was present Mr. Ferdinand, Mr. Jack, Mr. Dempsey and Yordy; that Dempsey brought out again that they were like a team of horses hitched together and that they owed half and Yordy's obligation was to raise \$2,000 and they would pay their \$2,000 because of the verdict; that one of the other gentlemen said, "My clearance, that's the law, you have got to pay half, you owe half of that. We are willing to pay our half, but you owe your half and you will have to pay your half"; that Yordy then told them that he couldn't pay it, and they asked him to come back again; that the next day he went to Dempsey's office and saw Dempsey alone; that Dempsey said, "We have talked this matter over and decided to pay \$200. You say you can't raise it and we are going to go out of our way. We only owe half. We are going to go out of our way to please you, and we will pay this \$200 if you can raise \$200"; that he told Dempsey he couldn't do it; that Dempsey said, "Well, if you want to go over to Mr. Knoblock's office we will go there, and if he comes down say that I'll be your saving"; that the next day they met at Knoblock's office and at that time Dempsey said to Knoblock, "We have agreed to pay \$200 for clearance in this case. We can't raise the money and he owes half and the company owes half, but they are willing to pay \$200." That Yordy then asked Knoblock what was the least he would give and he said \$500; that when he got home he reported for Dempsey, but Dempsey was not in so he talked to Mr. Jack, the manager of the association; that he said to Mr. Jack, "I suppose you heard we can settle this for \$200 and I owe \$1,000. Would you be willing to pay \$200 more if I could raise \$200. I would try to raise \$200"; that Jack said, "No, we have done more than we

owe you, we have overpaid, we owed half and you owed half and we paid \$2500 just to be a good fellow with you, and you only owe \$1,000 and that's what you will have to raise."

Yordy testified that shortly after such last conversation he received from the association a letter dated December 31, 1938, signed "Secretary-Manager" which, so far as is material, reads as follows:

"Mr. Dempsey and I feel certain that we will be able to settle the case for \$3,500.00 and you should try to be prepared when you come in Tuesday to have as much as possible with you in the form of cashier's check or be in a position to write a check up to \$750.00. There seems to me to be some chance of disposing of this Tuesday if these details can be worked out.

Come to my office between 2:30 and 3:30 as you have already planned."

Yordy further testified that after receiving such letter he took the two drafts to Mr. Jack's office; that he laid the \$650.00 draft on the desk and Mr. Jack said, "That will never do, you will have to cover \$750.00; you have got to cover \$750.00. We have gone out of our way to please you. We have raised it again \$250.00 to please you. You ought to be tickled to death to get out of it"; that thereupon Yordy gave Jack the other draft for \$100.00. Yordy testified his reason for getting the two drafts was because he thought he might save \$100.00 out of the settlement. Yordy testified that he thereupon signed a typewritten statement prepared by Mr. Dempsey, dated January 5, 1939, which reads as follows:

"I wish to make the statement that I had a thorough explanation and am fully acquainted with the facts and circumstances relative to the verdict that was rendered against me in connection with the lawsuit brought by Mr. Wittmer and that I fully realize my obligation relative to the satisfaction of the verdict in whole or in part.

owe you, we have covered, we owed half and you owed half and we
paid them just as we got along with you, and you only owe
1,000 and that's what you will have to raise."

Yorby testified that shortly after noon last cooperation was
received from the association a letter dated December 11, 1937,
signed "Secretary-Treasurer" which, so far as is material, reads as
follows:

"R. D. Dwyer and I feel sorry that we will be
able to settle the case for \$2,500.00 and you
should try to be prepared when you come in Tuesday
to have as much as possible with you in the form
of cashier's check or in a position to write a
check up to \$100.00. I have come to me to be some
chances of dissolving this Tuesday if these
details can be worked out.
Come to my office between 7:00 and 8:30 as you
have already promised."

Yorby further testified that after receiving such letter he
took the two drafts to Mr. Jacob's office; that he told the bank to
draft on the bank and Mr. Jacob said, "That will never do, you will
have to cover \$70.00; you have got to cover \$70.00. We have got to
out on our end to please you. We have raised it again \$20.00 to
please you. You ought to be tickled to death to get out of it";
that thereupon Yorby gave back the other draft for \$100.00. Yorby
testified his reason for getting the two drafts was because he
thought he might save \$100.00 out of the settlement. Yorby testified
that he thereupon signed a typewritten statement prepared by Mr.
Dwyer, dated January 5, 1938, which reads as follows:

"I wish to state the statement that I had a
thorough explanation and am fully acquainted with
the facts and circumstances relative to the
vehicle that was numbered against me in connection
with the lawsuit brought by Mr. Dwyer and that I
fully realize my obligation relative to the settle-
ment of the vehicle in whole or in part."

I wish at this time to further state that in making the compromise settlement with Mr. Knoblock for \$3500.00 in which I am paying \$750.00 that I am recommending that the settlement be made; that it is my desire to dispose of the case at this figure and further that I consider the insurance Association's contribution of \$2750.00 to be more than their legal obligation and that I am completely satisfied and appreciative of this settlement."

Yordy further testified that he relied on the "various statements that he was liable for half of the settlement."

Knoblock, so far as is material, testified that during the settlement negotiations at Knoblock's office Dempsey told Knoblock, "I have told Mr. Yordy all we have to do is match him dollar for dollar; that we are only liable for half of this. Regardless of that, however, we have agreed to go to \$2500 of the \$3500 you are demanding, and if this case is settled I have told Mr. Yordy that he would have to raise \$1,000.00"; that Dempsey said, "I have told Mr. Yordy that this verdict is for \$10,000.00, and that all we have to do is match him dollar for dollar, and that we have been willing to do, but Mr. Yordy states that he is having difficulty raising money, and in order to be fair about this we have agreed to go to \$2500.00."

Dempsey, so far as is material, testified that after the return of the verdict he told Yordy he would file a motion for judgment notwithstanding the verdict and a motion for new trial, and if the same were denied judgment would be entered against Yordy for \$10,000.00 and in that event the company^{would} have to pay \$5,000.00 of the judgment and Yordy would have the responsibility of paying the other \$5,000.00, and that Yordy said, "Well, if you say so I will take care of that right away"; that he then said to Yordy, "No, you shouldn't do that, you have everything to gain and nothing to lose, except a

I wish at this time to further state that in making the compromise settlement with Mr. Knoblock for \$3500.00 in which I am paying \$750.00 that I am recommending that the settlement be made; that it is my desire to dispose of the case at this figure and further that I consider the insurance Association's contribution of \$2750.00 to be more than their legal obligation and that I am completely satisfied and appreciative of this settlement."

Yorby further testified that he relied on the various statements

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settlement negotiations at Knoblock's office Dempsey told Knoblock,

"I have told Mr. Yorby all we have to do is watch him dollar for dollar;

that we are only liable for half of this. Regardless of that, how-

ever, we have agreed to go to \$2500 of the \$3500 you are demanding,

and in this case is settled I have told Mr. Yorby that he would have

to raise \$1,000.00"; that Dempsey said, "I have told Mr. Yorby that

this verdict is for \$10,000.00, and that all we have to do is watch

him dollar for dollar, and that we have been willing to do, but Mr.

Yorby states that he is having difficulty raising money, and in order

to be fair about this we have agreed to go to \$2500.00."

Dempsey, so far as is material, testified that after the return

of the verdict he told Yorby he would file a motion for judgment

notwithstanding the verdict and a motion for new trial, and if the

same were denied judgment would be entered against Yorby for \$10,000.00

would

and in that event the company have to pay \$5,000.00 of the

judgment and Yorby would have the responsibility of paying the other

\$5,000.00, and that Yorby said, "Well, if you say so I will take care

of that right away"; that he then said to Yorby, "Now, you shouldn't

do that, you have everything to gain and nothing to lose, except a

very small amount for an appeal"; that if judgment was entered a bond would have to be given for something slightly in excess of \$10,000 for an appeal to the Appellate Court, and Yordy would have to provide \$5,000 of the bond and the association would provide the remainder; that he asked Yordy if there would be any difficulty in his providing for a surety on the bond, and Yordy said there would not be; that on December 30, 1938, Yordy came to his office; that Jack, Ferdinand, and D'Arcy were present; that he then told Yordy that Knoblock said he would consider \$4,000 in settlement; that he told Yordy that he believed Knoblock might come down to \$3500, and that since Yordy had a verdict of \$10,000 against him he thought that for every dollar the association paid Yordy should pay a like dollar, because if it went to a conclusion with the judgment sustained each would have to part with dollar for dollar, and that Yordy said he wanted the case settled, but wanted to think about it for a while; that at such conference nothing was said to the effect that Yordy was liable in law for one-half of any settlement that might be made; that on January 3, 1939, Yordy came to his office and talked with him and Mr. Jack, and wanted to know if the association wouldn't contribute more to get the case out of the way, and that after some discussion Jack told Yordy the association would contribute \$2500; that the next day he and Yordy met at Knoblock's office and Knoblock then said he would take \$3500; that he and Yordy then walked outside of the building where Knoblock's office was located and Yordy told him he could raise \$750.00; that after that he had no further conversation with Yordy.

Dempsey further testified that in the conference of December 30th he suggested to Yordy that Yordy consult some other attorney, and that Yordy said he did not feel that was necessary.

very small amount for an appeal": that if judgment was entered a bond would have to be given for something slightly in excess of \$10,000 for an appeal to the Appellate Court, and Yordy would have to provide \$5,000 of the bond and the association would provide the remaining; that he asked Yordy if there would be any difficulty in his providing for a surety on the bond, and Yordy said there would not; that on December 20, 1932, Yordy came to his office; that Jack, Ferdinand, and D'Arcy were present; that he then told Yordy that Knoblock said he would consider \$4,000 in settlement; that he told Yordy that he believed Knoblock might come down to \$3500, and that since Yordy had a verdict of \$10,000 against him he thought that for every dollar the association paid Yordy should pay a like dollar, because if it went to a conclusion with the judgment sustained each would have to pay with dollar for dollar, and that Yordy said he wanted the case settled, but wanted to think about it for a while; that at such conference nothing was said to the effect that Yordy was liable in law for one-half of any settlement; that right he said; that on January 3, 1933, Yordy came to his office and talked with him and Mr. Jack, and wanted to know if the association wouldn't contribute more to get the case out of the way, and that after some discussion Jack told Yordy the association would contribute \$2500; that the next day he and Yordy met at Knoblock's office and Knoblock then said he would take \$3500; that he and Yordy then walked outside of the building where Knoblock's office was located and Yordy told him he could raise \$750.00; that after that he had no further conversation with Yordy. Leapsy further testified that in the conference of December 20th he suggested to Yordy that Yordy consult some other attorney, and that Yordy said he did not feel that was necessary.

In passing on a motion for judgment notwithstanding the verdict the court is required to assume that the evidence favorable to the plaintiff is true, and if there is any evidence fairly tending to prove the complaint, the motion must be denied, even though the court is of the opinion that a verdict for the plaintiff, if given, must be set aside as against the preponderance of the evidence. (Synwolt v. Klank, 296 Ill.App. 79; Hunter v. Troup, 315 Ill. 293; Osborn v. Leuffgen, 312 Ill.App. 251.)

Where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize the verdict, even though it may be supported by a lesser number of witnesses, a court of review will not set it aside as being against the manifest weight of the evidence. (Carney v. Sheedy, 295 Ill. 78; Summers v. Hendricks, 300 Ill.App. 498.)

The question of whether the witnesses for the plaintiff or the witnesses for the defendant were telling the truth was, of course, a question of fact for the jury. The jury evidently believed the testimony of the witnesses for the plaintiff. Assuming the testimony of plaintiff's witnesses to be true, we believe the jury was justified in finding, in effect, that the defendant, by fraud and deceit, caused the plaintiff to believe that he had to pay the \$750.00 towards such settlement, and that acting on such belief the plaintiff paid and the defendant thereby obtained such \$750.00.

It is our opinion that the evidence fairly tended to prove the material averments of the complaint, and it is our opinion that the verdict was not contrary to the manifest weight of the evidence.

The trial court therefore did not err in entering the judgment appealed from. Such judgment is affirmed.

Affirmed.

In passing on a motion for judgment notwithstanding the verdict the court is required to assume that the evidence favorable to the plaintiff is true, and if there is any evidence fairly tending to prove the complaint, the motion must be denied, even though the court is of the opinion that a verdict for the plaintiff is given, such as was the case in *Wright v. Wright*, 111 Ill. App. 2d 111, 232; *Wright v. Wright*, 111 Ill. App. 2d 111, 232; *Wright v. Wright*, 111 Ill. App. 2d 111, 232. There is a contrary authority of evidence and the testimony by fair and reasonable inference will authorize the verdict, even though it may be contradicted by a larger number of witnesses, a court of review will not set it aside as being against the manifest weight of the evidence. (*Wright v. Wright*, 111 Ill. App. 2d 111, 232; *Wright v. Wright*, 111 Ill. App. 2d 111, 232.)

The question of whether the witnesses for the plaintiff or the witnesses for the defendant were telling the truth and, of course, a question of fact for the jury. The jury evidently believed the testimony of the witnesses for the plaintiff. Regarding the testimony of plaintiff's witnesses to be true, we believe the jury was justified in finding, in effect, that the defendant, by fraud and deceit, caused the plaintiff to believe that he had to pay the \$750.00 for the such settlement, and that acting on such belief the plaintiff paid the defendant thereby obtaining such \$750.00.

It is our opinion that the evidence fairly tended to prove the material averments of the complaint, and it is our opinion that the verdict was not contrary to the manifest weight of the evidence.

The trial court therefore did not err in entering the judgment appealed from. Such judgment is affirmed.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

February Term, A. D. 1946

Gen. No. 9489

Agenda No. 8

John M. Furr and Amanda M. Furr,
Plaintiffs - Appellants,
-vs-
Shelby Loan & Trust Co., an
Illinois ^{Banking} Corporation of
Shelbyville, Illinois, et al.,
Defendants - Appellees.

Appeal from the
Circuit Court of
Shelby County.

328 I.A. 313

Dady, J.

This is a proceeding in chancery by which the plaintiffs, John M. Furr and Amanda M. Furr, seek the cancellation of a mortgage and notes thereby secured upon payment thereof by the plaintiffs, and the cancellation and removal of record of two deeds. The chancellor entered a decree dismissing the complaint for want of equity. Plaintiffs appeal.

On February 25, 1924, Arthur C. Wilson and Nancy J. Wilson, his wife, were indebted to the defendant Shelby Loan & Trust Company, hereafter referred to as "Trust Company," in the sum of \$18,000.00 on ten promissory notes of that date, due five years after date, bearing interest at 6% per annum, payable semi-annually. To secure payment thereof Wilson and wife on said date executed and delivered to the Trust Company a first mortgage on 226.64 acres of farm land. Thereafter the Trust Company, in due course, and apparently prior to maturity thereof, sold all of the promissory notes to certain of the defendants herein.

Abstract

STATE OF ILLINOIS

DEPARTMENT OF REVENUE

February Term, A. D. 1908

Volume 11, 8

Page 100

Appeal from the

Circuit Court of

Madison County.

328 I.A. 313

John M. Hunt and Amanda M. Hunt, Plaintiffs - Appellants.

-vs-

Shelby Loan & Trust Co., Defendant.

Illinois, Plaintiff, et al., Appellants - Appellees.

Page 11

This is a proceeding in rem by which the plaintiffs, John M. Hunt and Amanda M. Hunt, seek the cancellation of a mortgage and notes thereby secured upon payment thereof by the plaintiffs, and the cancellation and removal of record of the debts. The chancellor entered a decree dissolving the complaint for want of equity. Plaintiffs appeal.

On February 22, 1904, Arthur C. Wilson and Nancy J. Wilson,

his wife, were indebted to the defendant Shelby Loan & Trust

Company, hereafter referred to as "Trust Company," in the sum of

\$12,000.00 on two promissory notes of that date, due five years

after date, bearing interest at 4 per annum, payable semi-annually.

To secure payment thereof Wilson and wife on said date executed and

delivered to the Trust Company a first mortgage on 328.44 acres of

farm land. Thereafter the Trust Company, in due course, and apparently

prior to maturity thereof, sold all of the promissory notes to

certain of the defendants herein.

On March 1, 1929, an extension agreement was entered into between the mortgagors and the Trust Company whereby payment of the indebtedness was extended to March 1, 1934. The interest due March 1, 1930, and thereafter to and including September 1, 1931, was not paid. Prior to September 9, 1931, the premises were advertised for sale for delinquent taxes due in 1931. On September 9, 1931, there was due \$19,872.88 as principal and interest on the indebtedness, and the unpaid taxes amounted to \$348.88. The uncontradicted proof is that the fair cash market value of the premises in question on September 9, 1931, was not to exceed \$17,000.

On September 9, 1931, L. C. Westervelt, who was then a Trust Officer of the Trust Company, obtained from the mortgagors a warranty deed by which the whole of said real estate was conveyed to J. C. Westervelt. The stated consideration was one dollar. J. C. Westervelt was the then president of the Trust Company and was the father of L. C. Westervelt. The warranty deed contained a clause stating that the deed was subject to taxes then due and to the mortgage heretofore referred to, and contained a reservation to the grantors of the right of possession of the whole of the premises until March 1, 1932. The deed was filed for record on September 10, 1931. J. C. Westervelt, the grantee, was not present when the deed was made, had had no conversation with the grantors regarding the deed, and neither he nor any one in his behalf paid anything to the grantors in consideration of the execution of the deed.

On the following day, that is on September 10, 1931, J. C. Westervelt and wife executed and delivered to the Trust Company a quit claim deed conveying said real estate to the Trust Company. Nothing was paid by the Trust Company to J. C. Westervelt for the

On March 1, 1934, an extension agreement was entered into between the mortgagee and the Trust Company whereby payment of the indebtedness was extended to March 1, 1934. The interest due March 1, 1934, and thereafter to and including September 1, 1934, was not paid. Prior to September 1, 1934, the proceeds were advertised for sale for delinquent taxes and in 1934, on September 9, 1934, there was one bid, \$10,000.00 as principal and interest on the first mortgage, and the unpaid taxes amounted to \$44.00. The undersigned states that the fair cash market value of the premises in question on September 9, 1934, was not to exceed \$10,000. On September 9, 1934, L. O. Westervelt, who was then a Trust Officer of the Trust Company, obtained from the mortgagee a warranty deed by which the whole of said real estate was conveyed to L. O. Westervelt. The stated consideration was one dollar. L. O. Westervelt was the then President of the Trust Company and was the father of L. O. Westervelt. The warranty deed contained a clause stating that the deed was subject to taxes then due and to the mortgage mortgagee referred to, and contained a reservation to the mortgagee of the right of possession of the whole of the premises until March 1, 1935. The deed was filed for record on September 10, 1934. L. O. Westervelt, the trustee, was not present when the deed was made, and had no conversation with the grantor regarding the deed, and neither he nor any one in his behalf paid anything to the grantor in consideration of the execution of the deed. On the following day, that is on September 11, 1934, L. O. Westervelt and wife executed and delivered to the Trust Company a quitclaim deed conveying said real estate to the Trust Company. Nothing was paid by the Trust Company to L. O. Westervelt for the

execution of this deed, and it was held by the Trust Company without being recorded from September 10, 1931, until July 15, 1936, when it was recorded.

Such mortgage is the mortgage sought to be redeemed from, and said warranty and quit claim deed are the two deeds sought to be cancelled in this proceeding.

Arthur C. Wilson died intestate in 1938, and his widow died in 1939. No administration was had on his estate. He left surviving as his only heirs his widow and six children, viz, Grace Wilson, Luther Wilson, Walter Wilson, Amanda M. Furr (who is one of the plaintiffs and the wife of the co-plaintiff John Furr), Clarence Wilson and Howard Wilson. Thereafter Grace Wilson died unmarried and intestate. Thereafter and on January 12, 1944, Luther Wilson, Walter Wilson, Clarence Wilson and Howard Wilson, for the consideration of four dollars, quit-claimed all interest in said premises to the plaintiffs. On July 11, 1944, plaintiffs started this suit.

On September 11, 1931, a lease dated September 9, 1931, was entered into by the Trust Company as lessor and John M. Furr as lessee, whereby John M. Furr rented from the Trust Company the south 118.64 acres of said real estate from March 1, 1932, to February 28, 1933. This lease contained a provision that it was subject to cancellation in case of a bonafide sale by the lessor before November 1, 1931, in which case \$500 should be paid to the lessee. A second lease was entered into with the Trust Company by L. C. Westervelt, trust officer, and John M. Furr on August 18, 1932, whereby such 118.64 acres were leased to Furr from March 1, 1933, to February 28, 1934. On the back of the second lease appears the following indorsement, dated August 18, 1932, and

execution of this deed, and it was held by the Trust Company without being recorded from September 10, 1911, until July 12, 1922, when it was recorded.

Such mortgage in the mortgage book is to be released from, and said mortgage and said deed are the two deeds sought to be cancelled in this proceeding.

Arthur G. Wilson died intestate in 1902, and his wife died in 1903. No administration was had on his estate. He left surviving as his only heirs his wife and six children, viz., Grace Wilson, Luther Wilson, Alice Wilson, Amanda L. Pratt (who is one of the plaintiffs and the wife of the co-defendant John Pratt), Clarence Wilson and Howard Wilson. The latter Grace Wilson died unmarried and intestate. The latter and on January 12, 1904, Luther Wilson, Alice Wilson, Clarence Wilson and Howard Wilson, for the consideration of four dollars, well-claimed all interest in said premises to the plaintiffs. On July 11, 1904, plaintiffs accepted this deed. On September 11, 1907, a lease dated September 9, 1907, was entered into by the Trust Company as lessor and John A. Pratt as lessee, whereby John A. Pratt rented from the Trust Company the south 1/2 of said real estate from March 1, 1907, to February 28, 1908. This lease contained a provision that it was subject to cancellation in case of a forfeiture sale by the lessor before November 1, 1907, in which case said lease should be held to the lessee. A second lease was entered into with the Trust Company by L. G. Westervelt, trust officer, and John A. Pratt on August 12, 1907, whereby such 1/2 of said premises were leased to Pratt from March 1, 1907, to February 28, 1908. On the back of the second lease appears the following instrument, dated August 12, 1907, and

signed by Arthur C. Wilson: "I hereby acknowledge that I am leasing the building and six acres south of the same as described in the within lease, as a sub-tenant from John M. Furr and hold it only as such sub-tenant and in no other right, said John M. Furr being the tenant of the Shelby Loan & Trust Company, Agent." Furr duly paid to the Trust Company all rents due under such two leases.

On October 22, 1931, the Trust Company leased the north 108 acres of said farm to Claude Small for the period beginning March 1, 1932, and ending February 28, 1935, and thereafter the Trust Company collected the rents due under such lease.

Ever since the expiration of such leases to Furr and Small, the Trust Company, as lessor, has leased the whole of such farm and collected all rents therefrom. After paying taxes, insurance and upkeep, the Trust Company has from time to time paid all of the net income, first to the note holders and later to the holders of the aliquot part certificates hereafter referred to.

On September 9, 1931, the plaintiffs lived on an adjoining farm. Since such date neither of the plaintiffs has lived on the Wilson farm. After September 9, 1931, the mortgagors continued to live in the farm house on the Wilson farm until March 1, 1934, when they moved from the farm and did not thereafter live thereon, but continued to live in the neighborhood until their deaths.

On April 8, 1937, the note holders surrendered such notes to the Trust Company and the company issued to each note holder "an aliquot part certificate" evidencing his ownership of a prorata interest in said farm. The total of the certificates covered all interest in the Wilson farm. Each certificate recited that the owner had deposited his note with the company for cancellation and surrender, that it was understood title "has" been placed in

alimony by Arthur O. Wilson: "I hereby acknowledge that I am
leasing the building and six acres south of the same as described
in the within lease, as a sub-tenant from John M. Furr and hold it
only as such sub-tenant and in no other right, said John M. Furr
before the terms of the within lease to Trust Company, Agent." Furr
only paid to the Trust Company all rents due under such lease.
On October 22, 1931, the Trust Company leased the north 1/4 of the
of said farm to George Smith for the period beginning March 1,
1932, and ending February 28, 1933, and thereafter the Trust Company
collected the rents due under such lease.
Ever since the expiration of such lease to Furr and Smith,
the Trust Company, as lessor, has leased the whole of such farm
and collected all rents therefrom. After paying taxes, insurance
and other, the Trust Company has from time to time paid all of the
net income, first to the note holders and later to the holders of
the all first certificates thereafter referred to.
On September 2, 1931, the plaintiff lived on an adjoining farm.
Within such date neither of the plaintiff nor lived on the Wilson
farm. After September 2, 1931, the mortgage continued to live
in the farm house on the Wilson farm until March 1, 1934, when they
moved from the farm and did not thereafter live thereon, but
continued to live in the neighborhood until their death.
On April 2, 1937, the note holders transferred such notes to the
Trust Company and the company issued to each note holder an
all first certificate" evidencing his ownership of a proportionate
interest in said farm. The total of the certificates covered
all interest in the Wilson farm. Each certificate recited that
the owner had assigned his note with the company for consolidation
and retransfer, that it was understood this "has" been placed in

the company by the mortgagor in satisfaction of the mortgage debt, that the company should hold title for the benefit of the parties interested, that the company might manage and rent the premises, and from the proceeds pay the taxes and expenses, the overplus to be distributed among the parties interested; that any offer of purchase should be submitted to the certificate holders before a sale was made, that upon a sale the company should pay the proceeds, less expenses, to the certificate holders, that if the sale price was more than the mortgage indebtedness, the excess should be paid to such certificate holders, and that the management of the farm might be removed from the Trust Company on request by two thirds of the parties interested.

The mortgage at all times has been and is held by the Trust Company and no release thereof has been executed. The notes were never returned to the mortgagors, and ever since the issuance of such aliquot part certificates the Trust Company has held such notes.

After the execution of the warranty deed on September 9, 1931, neither Arthur C. Wilson, nor any one claiming under him, asserted or attempted to assert that said mortgage indebtedness was not satisfied by the giving of said warranty deed until about the time plaintiffs obtained such quit-claim deed in January, 1944, from the Wilson heirs.

The only witnesses who testified as to the giving or obtaining of the warranty deed were John M. Furr and Lula Wilson (she being a daughter-in-law of the mortgagors), who testified for the plaintiffs, and L. C. Westervelt who testified for the defendants.

John M. Furr testified that on September 9, 1931, Arthur C. Wilson told him that L. C. Westervelt had been out that afternoon and wanted a deed for the place, and wanted the witness to farm the land, and was coming back that evening, and Mr. Wilson asked

the company by the mortgagee in satisfaction of the mortgage debt, that the company should hold title for the benefit of the parties interested, that the company should manage and rent the premises, and from the proceeds pay the taxes and expenses, the proceeds to be distributed among the parties interested; that any other of purchase should be submitted to the certificate holders before a sale was made, that upon a sale the company should pay the proceeds, less expenses, to the certificate holders, that if the sale price was more than the mortgage indebtedness, the excess should be paid to such certificate holders, and that the management of the farm might be removed from the Trust Company on request by two thirds of the parties interested.

The mortgage at all times has been and is held by the Trust Company and no release thereof has been executed. The notes were never returned to the mortgagee, and even since the issuance of such abstract and certificate the Trust Company has held such notes.

After the execution of the warranty deed on September 9, 1901, neither Arthur G. Wilson, nor any one claiming under him, asserted or attempted to assert that said mortgage indebtedness was not satisfied by the giving of said warranty deed until about the time plaintiff obtained such quit-claim deed in January, 1904, from the Wilson heirs.

The only witnesses who testified as to the giving or obtaining of the warranty deed were John W. Ford and Lila Wilson (the being a daughter-in-law of the mortgagee), who testified for the

plaintiff, and L. O. Westervelt who testified for the defendants. John W. Ford testified that on September 9, 1901, Arthur G. Wilson told him that L. O. Westervelt had been out that afternoon and wanted a deed for the place, and wanted the witness to farm the land, and was coming back that evening, and Mr. Wilson asked

the witness to come up; that later that evening he came to the farm house and there found Mr. and Mrs. Wilson, Luther Wilson, L. C. Westervelt, Link Ward and Jake Wendling; that Westervelt and Arthur C. Wilson then went in the farm house and the witness talked on the porch with Mr. Ward, while Wendling sat in an automobile; that he was then called into the house by Westervelt, and there were then in the room Mr. Wilson, Mrs. Wilson and Westervelt; that Westervelt said to the witness, "I want the folks to sign a deed to the place"; that the witness said, "What for?"; that Westervelt said, "They are pretty much involved and anybody could throw a judgment against them, and it would throw them in bad shape and the bank too, that this was only additional security to protect the bank in case a judgment should be entered against the folks"; that the witness said, "I don't know, what about it?"; that Arthur C. Wilson said, "I don't know whether I ought to do this or not"; that Westervelt said that the bank had been good to Mr. Wilson and Mr. Wilson ought to be good too and protect the bank, and said the folks could continue to live right there and they would rent the land to the witness; that the witness said, "If that's just additional security I don't see no harm about the deed"; that Mrs. Arthur C. Wilson began to cry and went into the kitchen; that Westervelt said he thought the thing to do was to leave the mortgage in the Trust Company's hands until the matter was settled up; that he thought the thing to do was to sell the land and all over the mortgage would go to Arthur C. Wilson; that Westervelt said the deed ran to J. C. Westervelt because the latter was president of the Trust Company; that Westervelt asked the witness if he would not go out and talk to Mrs. Wilson and ask her to come back in, and he did go out and talk to Mrs. Wilson and she then came into the room

the witness to come up; that later that evening he came to the farm house and there found Mr. and Mrs. Wilson, Luther Wilson, L. O. Westervelt, Alvin Ward and John Wendling; that Westervelt and Arthur O. Wilson then went in the farm house and the witness talked on the porch with Mr. Ward, while Wendling sat in an automobile; that he was then called into the house by Westervelt, and there were then in the room Mr. Wilson, Mrs. Wilson and Westervelt; that Westervelt said to the witness, "I want the folks to sign a deed to the place"; that the witness said, "What for?"; that Westervelt said, "They are pretty much involved and anybody could throw a judgment against them", and it would throw them in bad with the bank too, that this was only additional security to protect the bank in case a judgment should be entered against the folks"; that the witness said, "I don't know, what about it?"; that Arthur O. Wilson said, "I don't know whether I ought to do this or not"; that Westervelt said that the bank had been good to Mr. Wilson and Mr. Wilson ought to be good too and protect the bank, and said the folks could continue to live right there and they could rent the land to the witness; that the witness said, "If that's just additional security I don't see no harm about the deed"; that Mrs. Arthur O. Wilson began to cry and went into the kitchen; that Westervelt said he thought the thing to do was to leave the mortgage in the Trust Company's hands until the matter was settled up; that he thought the thing to do was to sell the land and all over the mortgage would go to Arthur O. Wilson; that Westervelt said the deed ran to L. O. Westervelt because the latter was president of the Trust Company; that Westervelt asked the witness if he would not go out and talk to Mrs. Wilson and ask her to come back in, and he did so and talk to Mrs. Wilson and she then came into the room

with Lula Wilson; that Westervelt then went ahead to explain again what the deed was for, practically the same thing, that they wanted a deed for their own protection; that Mrs. Wilson asked Lula and the witness what they thought about it, and they told her that she could go ahead and sign it and could continue to live right there; that the deed was then executed, and Jake Wendling, who was a Notary Public, then came into the house and took the acknowledgment to the deed; that after the deed was executed and given to Westervelt he said that he was going to St. Louis the next day and would not be in town in time to get the deed recorded, and asked them not to say anything to outsiders about the case, if anybody gets hold of it they are liable to get a judgment against them and knock it out for fifteen months; that the witness asked Westervelt if the mortgage and notes would be delivered out there, and Westervelt said, no, he thought the thing to do was to leave it right there at the bank until it was settled up in case of a sale. When the witness was asked why he asked Westervelt if the notes and mortgage would be sent to Mr. Wilson if they were not paid, his answer was, "Well, I was wondering if he was going to do it - if that was the way he was going to do it."

Lula Wilson testified that earlier in the evening "the folks had told us that Mr. Westervelt wanted them to sign a deed for their place to the bank," that after Westervelt came the witness was in the kitchen when Mrs. Wilson came in crying; that later Mrs. Wilson and the witness went into the room where the deed was later executed; that Westervelt then asked Mrs. Wilson to sign the deed and said, "Mrs. Wilson, I think you should sign the deed, it is as much for your good as for the bank," and said, "Mr. Wilson will sign the deed

with Miss Wilson; that Westervelt then went ahead to explain again what the deed was for, practically the same thing, that they wanted a deed for their own protection; that Mrs. Wilson asked this and the witness what they thought about it, and they told her that she could go ahead and sign it and could continue to live right there; that the deed was then executed, and John Harding, who was a notary public, then came into the house and took the solemn oath to the deed; that after the deed was executed and given to Westervelt he said that he was going to St. Louis the next day and would not be in town in time to get the deed recorded, and asked them not to say anything to outsiders about the case, if anybody came hold of it they were liable to get a judgment against them and knock it out for fifteen months; that the witness asked Westervelt if the mortgage and notes would be delivered out there, and Westervelt said, no, he thought the thing to do was to leave it right there at the bank until it was settled up in case of a sale. When the witness was asked why he asked Westervelt if the notes and mortgage would be sent to Mr. Wilson if they were not paid, his answer was, "Well, I was wondering if he was going to do it - if that was the way he was going to do it."

Miss Wilson testified that earlier in the evening "the folks told us that Mr. Westervelt wanted them to sign a deed for their place to the bank," that after Westervelt came the witness was in the kitchen when Mr. Wilson came in crying; that later Mrs. Wilson and the witness went into the room where the deed was later executed; that Westervelt then asked Mrs. Wilson to sign the deed and said, "Mrs. Wilson, I think you should sign the deed, it is as much for your good as for the bank," and said, "Mr. Wilson will sign the deed

if you will"; that Mrs. Wilson said, "John, what do you think I should do?" and Mr. Wilson said, "If that's the way it is I can't see any harm in your signing the deed;" that Westervelt said they were not taking their home from them, it was just making it safer for the bank by them signing the deed, and that they still could stay on the place and live there as their home, and Mrs. Wilson said, "If that's the way you ~~XXXXX~~ think I should do I will sign it," and the deed was then executed. She testified that nothing was said in her presence about other creditors or judgments.

L. C. Westervelt testified that at the time of the execution of the deed he was an officer of the Trust Company, that shortly before the execution of such deed he had several conversations with Arthur C. Wilson in the bank about the state of the mortgage indebtedness, the unpaid taxes and interest, and that the value of the land was less than the mortgage debt and interest, and that he asked Wilson to make a deed in satisfaction of the indebtedness; that shortly after noon on September 9, 1931, he went to the Wilson home and talked to Arthur C. Wilson and his wife about the matter; that he then told Mr. Wilson the situation so far as the amount of the interest that was past due, and the taxes would have to be paid, and the bank would have to do something about it and again asked Wilson to make a deed in satisfaction of the debt to avoid a foreclosure, and told Wilson if they gave the bank a deed to the property that would end their obligation to the bank on the mortgage; that Wilson asked permission to live on the farm until the then crops had matured, and he told Wilson he would incorporate that in the deed; that Mr. Wilson then said he would sign a deed, and the witness then went back to the bank and had the deed prepared and took it out that evening, and that after some little discussion in the

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should do" and Mr. Wilson said, "if that's the way it is I can't
if you will"; that Mrs. Wilson said, "John, what do you think I

farm house the deed was executed.

Westervelt denied he told the Wilsons that they were pretty much involved and if a judgment was taken against them it would throw them in bad shape and the bank too; denied he told the Wilsons that the deed was only additional security for the bank; denied he said the mortgagors could stay right on the farm just as they had before, but said he did tell them that the Trust Company would be glad to rent the south part of the farm to John M. Furr and if Furr cared to let the Wilsons continue to live in the house during the term of the lease that was no affair of the Trust Company; denied he said he thought the thing to do was to just leave the mortgage in the Trust Company's hands until the matter was settled up; denied he said he thought the thing to do was to sell the land and all over what the mortgage debt took would be turned over to Mr. Wilson; denied he said they were not taking the Wilson's house from them, and denied he said they were just making things safe for the bank and Mr. and Mrs. Wilson could still stay there as their home.

Westervelt's explanation as to the delay in issuing the aliquot part certificates was that the Trust Company had difficulty in getting the note holders to meet and agree on a plan for the operation and sale of the farm, and that such agreement was not reached until about 1937.

John M. Furr testified that on September 11, 1931, he went to the Trust Company and told L. C. Westervelt it looked to him that it would be better for the Trust Company to give the Wilsons the farm house and eight acres of land and "straighten the thing up right now," and that Westervelt said he would see. Westervelt testified he had no recollection of any such conversation.

That house the deed was executed.

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throw them in bad shape and the bank too; denied he told the Wilsons that the bank was only additional security for the bank;

denied he said the Wilsons could stay right in the farm just as they had before, but said he did tell them that the Trust Company would be glad to rent the south part of the farm to John W. Hurt

and if Hurt agreed to let the Wilsons continue to live in the house during the term of the lease that was no affair of the Trust Company;

denied he said he thought the thing to do was to just leave the mortgage in the Trust Company's hands until the matter was settled up;

denied he said he thought the thing to do was to sell the land

and all over what the mortgage debt back would be turned over to Mr. Wilson; denied he said they were not calling the Wilsons

house from them, and denied he said they were just making things safe for the bank and Mr. and Mrs. Wilson could still stay there

on their farm.

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part certificate was that the Trust Company had difficulty in

getting the note holders to meet and agree on a plan for the operation and sale of the farm, and that such agreement was not reached until

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it would be better for the Trust Company to give the Wilsons the farm house and eight acres of land and "straighten the thing up

right now," and that Westervelt said he would see Westervelt

testified he had no recollection of any such conversation.

Where a mortgagee takes a conveyance of the mortgaged premises from the mortgagors, but retains the mortgage and the note thereby secured, in the absence of proof showing a contrary intention there will be no merger or extinguishment of the mortgage, but the intention of the parties at the time of the execution of the deed is the controlling element. (Dunphy v. Riddle, 86 Ill. 22.) The question whether a deed absolute in form is in fact a mortgage depends upon the intention of the parties in that regard at the time of its execution. Parol testimony is admissible to show what was the intention, and every fact tending to illustrate the purpose and intent of the parties is receivable as evidence. (Totten v. Totten, 294 Ill. 70.)

The testimony of the two witnesses for the plaintiffs as to what was said and done at the time of the execution of the deed materially conflicts with the testimony of the one witness for the defendants. The trial court saw and heard all of such witnesses testify, and of course, was in a better position than are we to determine the credibility of such witnesses. The trial judge evidently believed the testimony of the one witness for the defendants that in the conversation of September 9, 1931, he asked Arthur C. Wilson to make a deed in satisfaction of the indebtedness, and that he told Mr. Wilson such a deed would end his obligation to the bank, ^{and} that Wilson asked and was given permission to remain on the farm until the current crops had matured. We cannot say that the trial judge was not justified in believing such testimony. The testimony of such witness for the defense to the effect that it was the understanding and intention of the parties that the warranty deed was given, not as additional security, but in satisfaction of the mortgage indebtedness, is corroborated by the fact that the

There is no question as to the correctness of the statement that the parties, but without the parties and the fact thereby secured, in the absence of proof showing a contrary intention there will be no matter in establishment of the contrary, but the intention of the parties at the time of the execution of the deed is the controlling element. (Dunphy v. Sullivan, 11 Ill. 2d.) The question whether a deed absolute in form is in fact a mortgage depends upon the intention of the parties at that time and at the time of its execution. Every fact tending to illustrate the purpose was the intention, and every fact tending to illustrate the purpose and intent of the parties is receivable as evidence. (Totten v. Totten, 111 Ill. 2d.)

The testimony of the two witnesses for the plaintiff is so that was all and true at the time of the execution of the deed and is in conflict with the testimony of the one witness for the defendant. The trial court has heard all of such witnesses testify, and of course, was in a better position than we to determine the credibility of each witness. The trial judge adversely believed the testimony of the one witness for the defendant and in the conversation of November 2, 1921, he asked Arthur G. Wilson to make a deed in satisfaction of the indebtedness, and that he told Mr. Wilson such a deed would and his obligation to the bank, and Wilson refused and was given permission to remain on the farm until the current mortgage was paid. We cannot say that the trial judge was not justified in believing such testimony. The testimony of such witness for the defendant to the effect that it was his understanding and intention of the parties that the mortgage deed was given, not as additional security, but in satisfaction of the indebtedness, is corroborated by the fact that the

uncontradicted evidence shows that at the time of the execution of the deed the then value of the premises was less than the amount of the indebtedness, by the fact that the deed limited the right of possession of the grantors to March 1, 1932, the fact that on August 18, 1932, Arthur C. Wilson signed the indorsement on the Furr lease which stated that he, as a sub-tenant, was then leasing six acres of the farm from John M. Furr, and in no other right, the fact that on March 1, 1934, when the last Furr lease had terminated, Arthur C. Wilson and wife moved away from the farm and never thereafter claimed or asserted any interest therein, the fact that Arthur C. Wilson did not at any time after the execution of the warranty deed offer or attempt to pay the indebtedness or make any inquiry concerning the same, and the fact that after September 9, 1931, the Trust Company made no attempt or request for the payment of the indebtedness, but immediately took and continuously retained the exclusive and undisputed possession of the whole of the premises and during such time exercised open and unquestioned rights of ownership.

It is our opinion that the trial court did not err in entering the decree in question. Therefore such decree is affirmed.

Affirmed.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
FEBRUARY TERM, A. D. 1946

Gen. No. 9492

Agenda No. 10

JOHN E. NEAL,)
Plaintiff-Appellant,)
vs.)
OPAL FERN NEAL,)
Defendant-Appellee.)

Appeal from the
Circuit Court of
Sangamon County.

2178

Wheat, J.

328 I.A. 314'

This is an action for divorce filed by the husband, appellant, against the wife, appellee, charging adultery. The cause was heard by the Circuit Court of Sangamon County, without a jury, after which the Court dismissed the cause for want of equity.

The sole question presented is as to whether or not the finding of the trial judge was against the manifest weight of the evidence.

The plaintiff, John E. Neal, testified to the marriage at St. Charles, Missouri, in April, 1943; that he left for the Navy from Springfield, Illinois, on September 17, 1943, and went to Great Lakes, Illinois; that he was stationed at Memphis, Tennessee, for seventeen months; that his prior suspicions of his wife's conduct were corroborated when he returned to Springfield, on leave, in February, 1945; that while in Memphis, his wife stayed out all night on several occasions; that he had not lived with his wife since he learned of certain things while home on leave in January and February, 1945.

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Gussie Scott, testifying for the plaintiff, said that she had seen defendant in the tavern where witness was employed, in December, 1943, about 10 P.M., drinking beer, in the company of one Carl Radford; that at another tavern, defendant was drinking beer with plaintiff's brother, Harry Neal, no date being specified; that on each occasion, all she saw them do was to sit there drinking beer. On redirect examination, she stated that when she saw defendant in the company of "this man", they came in by themselves and left by themselves.

Harry Neal, brother of plaintiff, testified that in answer to a question by plaintiff in February, 1945, he replied that he had been with defendant. Witness then testified that he had been in the company of Mrs. Neal, the defendant, a lot of times; that the first time he was alone with her was in May, 1943, on a trip to Jacksonville and Carlinville; that later, they drank beer until eight-thirty or nine o'clock and started back to Springfield; that at Mrs. Neal's request, he stopped the car and had intimate relations with her; that several weeks later he had sexual relations with her in a trailer where she was living on Clear Lake Avenue; that later, on another occasion in the trailer, the act was repeated; that the last time he had sexual relations with her was in 1943, before she joined her husband in Memphis. On cross examination, he stated that he did not tell his brother about this matter until 1945 because "I figured that was his business, not my business; I wasn't telling nothing." Q. "Wouldn't that have been just as applicable before?" A. "No." Q. "Why didn't you tell him before?" A. "I will tell you why. Do you want me to tell you?" Q. "Yes." A. "I went out one night and I had \$67.00 in my pocket and she took all my dough and the next morning she gave me my dough and I stuck it in my pocket and when I got home I had \$54.00. She takes ten dollars of my dough like that." He further stated that on one

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occasion in the trailer, in June, 1943, defendant's mother was there; that Mrs. Neal came to his bed and told him not to worry because she had given her mother two sleeping pills; that he told plaintiff the whole story in February, 1945, because "Any woman that would switch on anybody and take a ten dollar bill from me, I will tell him everything." Q. "You are more concerned about the loss of a ten dollar bill than you are about anything else?" A. "Yes, sure - me - Anybody take a ten dollar bill - - - ."

The defendant testified that after her marriage and before her husband left for the Navy, they lived in a trailer on Clear Lake Avenue, Springfield; that she was employed and self-supporting; that her husband never brought any money home; that he drove a cab and stayed out nights; that after his entrance in the Navy, she complied with his request and joined him in Memphis in December, 1943; that in February, 1945, he requested a divorce because, he said, he had a girl pregnant who needed the fifty dollars a month allotment money; that he said he also had another woman pregnant but she couldn't find him by reason of his use of an assumed name. She introduced into evidence a letter from plaintiff, dated January 23, 1945, in which he asked for a divorce and stated that he would never quit until he got it; no accusations of any kind were made in the letter. Witness denied that she and Harry Neal stopped on the road and had intimate relations on the return trip to Springfield; denied that she ever had sexual relations with him in the trailer or on any other occasion; denied that she had intercourse with anyone other than her husband since their marriage. On cross examination, she stated that she and her husband lived together a while before their marriage as husband and wife; that during their married life she had been in taverns drinking beer but never alone with a man; that at one time she had been in Lloyd's tavern with Harry Neal and his wife.

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Bell Flowers testified that she was the mother of defendant; that during the time the trailer was used, she, at all times, lived there with her daughter; that Harry Neal was there several times and that most of the times he was accompanied by a woman not his wife; that he never had any opportunity to be alone with her daughter; that the daughter never gave her any sleeping pills.

Andrew White, called as a witness on behalf of plaintiff, testified that he was acquainted with both husband and wife; that in October, 1943, he saw defendant at a tavern, between eight and nine o'clock in the evening, and that she was in the company with a man not her husband; that the two of them left the tavern and went into a tourist cabin; that witness, in a car, was waiting for another man and remained there for about forty minutes and never did see defendant come out; that no lights were turned on in the cabin the entire time. On cross examination, witness stated that he was well acquainted with Harry Neal and occasionally drank with him; that he did not narrate this incident until several days before the trial.

The evidence of two of plaintiff's witnesses, Harry Neal and Andrew White, bears directly on the commission of adultery by the defendant. As to the testimony of plaintiff's brother, Harry Neal, there is no requirement that the credulity of the Chancellor be taxed beyond the standards of any reasonably minded person. In evaluating the testimony of the witness, Andrew White, his friendship with plaintiff and plaintiff's brother must be kept in mind, together with his concealment of his knowledge until several days before the trial. There is also the statement in the letter of plaintiff to defendant in regard to a divorce, that he would never quit until he got it.

The above information was obtained from the records of the Bureau of Census, Department of Commerce, Washington, D.C., and is being furnished to you for your information.

Sincerely,
Director

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Irrespective of this, the rule is well settled that the credibility of a witness in a case tried before the Court and the determination of the weight to be given to such testimony are for the Trial Court. The Chancellor, who saw and heard the witnesses testify, had an opportunity to observe their conduct and demeanor while testifying and is therefore in a better position to weigh the evidence than is a reviewing Court. Where the evidence is merely conflicting, this Court will not substitute its judgment for that of the Trial Court.

It cannot be said the finding of the Trial Court was against the manifest weight of the evidence and the order dismissing the complaint for want of equity is affirmed.

Affirmed.

1866

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43185

MARKS HURTT and MARTHA HURTT,
his wife,

Appellees,

v.

FLORENCE CONKLIN and NELLIE M.
CONKLIN,

Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

328 I.A. 314²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is a habeas corpus proceeding brought by Marks Hurtt and Martha Hurtt, his wife, of Geneva, Ohio, to recover the custody of their fourteen year old daughter, Dorothy Ellen Hurtt (hereinafter referred to as Dorothy), from Florence Conklin and Nellie Conklin of Chicago, Illinois. The judgment order of the trial court awarded the custody of Dorothy to her parents and the Conklins appeal.

For a clearer understanding of the issues presented in this case it is necessary that the factual situation be set forth somewhat fully. The evidence discloses that the defendants, Florence Conklin and Nellie M. Conklin, are sisters and that they are first cousins of the plaintiff, Marks Hurtt; that he lived with the Conklins in Chicago from 1911 until 1914, when he married his present wife, Martha Hurtt; that the Hurtt's have nine living children; that the oldest of these children, Bill, was born in Chicago and when he was a baby the Conklins took care of him a great deal of the time; that the Hurtt's moved to Ohio and when Bill was about eight years old his parents gave him to the defendants to raise; that the Conklins kept him at their own expense and sent him through three and one-half years of high school, when he quit school of his own accord in 1934 and went to work; that Bill is now married, has two infant boys and lives in Chicago; that in the fall of 1934 Betty Jane, the oldest daughter of

MARKS HURTT and MARTHA HURTT,
his wife,
Appellees,

v.

FLORENCE CONKLIN and NELLIE M. CONKLIN,
Appellants.

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COURT, COOK COUNTY.

3281A.314

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Marks Hurtt; that he lived with the Conklins in Chicago from

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that the Conklins kept him at their own expense and sent him

through three and one-half years of high school, when he quit

school of his own accord in 1934 and went to work; that Bill

is now married, has two infant boys and lives in Chicago;

that in the fall of 1934 Betty Jane, the oldest daughter of

the Hurtt, then sixteen years old, came to Chicago to visit the World's Fair and brought Dorothy, then four years old, with her; that they both stayed with the Conklins until Betty Jane, shortly thereafter, secured employment as a maid with the assistance of Florence Conklin; that Dorothy remained with the Conklins until the following May, when Florence Conklin and Betty Jane took her to the Hurtt home in Ashtabula, Ohio; and that the Hurtt later moved to Geneva, Ohio, where Dorothy started to school but failed in some of her work.

The evidence further discloses that in January, 1936, when Dorothy was six years old, Betty Jane brought her back to the home of the Conklins; that the Conklins immediately started her to school, where she had to take her first semester's work over again; that from that time until June, 1943 she lived with the Conklins, making short trips to the Hurtt home in Ohio, usually with Florence Conklin, during each summer vacation except one; that she spent the greater part of her vacation periods with the Conklins at a summer place they had near Libertyville, Illinois; that she did very well in her school work, engaged in 4-H work, did some 4-H demonstrating, enjoyed working in the garden, did some canning of vegetables herself and was taught by Florence Conklin to perform household duties, including cooking; that Dorothy had piano lessons during the last three years she was with the Conklins; that she had engaged in Girl Scout work and won several medals; and that she had formed many close friendships with members of her class at school and with others and generally lived the life of a normal, healthy, happy girl.

In relating the circumstances under which Dorothy was sent to live with the defendants when she was six years old, Florence Conklin testified that Mrs. Hurtt wrote a letter to her and her

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each summer vacation except one; that she spent the greater
Hurtt home in Ohio, usually with Florence Conklin, during
1943 she lived with the Conklins, making short trips to the
semester's work over again; that from that time until June,
started her to school, where she had to take her first
to the home of the Conklins; that the Conklins immediately
when Dorothy was six years old, Betty Jane brought her back
The evidence further discloses that in January, 1936,
her work.

Ohio, where Dorothy started to school but failed in some of
Ashtabula, Ohio; and that the Hurtts later moved to Geneva,
Conklin and Betty Jane took her to the Hurtt home in
with the Conklins until the following May, when Florence
the assistance of Florence Conklin; that Dorothy remained
Jane, shortly thereafter, secured employment as a maid with
with her; that they both stayed with the Conklins until Betty
the World's Fair and brought Dorothy, then four years old,
the Hurtts, then sixteen years old, came to Chicago to visit

sister, which they were unable to locate; that this letter stated in substance that "if we would take Dorothy and give her the advantages and education here and send her through school as we had Bill that she could stay with us as long as we felt that we could keep her"; that shortly after she replied to Mrs. Hurtt's letter Dorothy was brought to her home by her sister, Betty Jane, and that she remained with her and her sister from that time until the latter part of June, 1943. Nellie Conklin testified in this regard to the same effect as her sister Florence.

Marks Hurtt testified that when Dorothy was sent to live with the Conklins in 1936 his wife "was sick and Betty thought it would be nice providing that the girls [Conklins] would take her [Dorothy] up for a short time until the Mrs. had gotten well * * * so she [Dorothy] stayed there right along. So finally they [Conklins] said they would keep her, and at any time that we wanted her we could have her"; that the understanding was that he could have Dorothy back at any time he wanted her and that the Conklins "were to bring her down for summer vacations." Hurtt denied that he ever told the Conklins at any time that, if they took Dorothy to live with them, they could keep her through her school years and he also denied that he ever wrote them to that effect.

Martha Hurtt testified that she permitted Dorothy to go to live with the Conklins in 1936 because she had six children at that time; and that her husband's "financial circumstances * * * were very bad and she was sick in bed." She denied that she ever told "either of the Conklin girls that Dorothy could remain with them during the entire period that she would go to school" or that she ever made "any agreements of any kind with the Conklin girls in reference to the future of Dorothy" and stated that she never had any discussion with the Conklins

as her sister Florence. Nellie Conklin testified in this regard to the same effect sister from that time until the latter part of June, 1943. sister, Betty Jane, and that she remained with her and her to Mrs. Hurtt's letter Dorothy was brought to her home by her we felt that we could keep her"; that shortly after she replied school as we had Bill that she could stay with us as long as her the advantages and education here and send her through stated in substance that "if we would take Dorothy and give sister, which they were unable to locate; that this letter

them to that effect. through her school years and he also denied that he ever wrote if they took Dorothy to live with them, they could keep her. Hurtt denied that he ever told the Conklins at any time that that the Conklins "were to bring her down for summer vacations." first he could have Dorothy back at any time he wanted her and we wanted her we could have her"; that the understanding was they [Conklins] said they would keep her, and at any time that * * * so she [Dorothy] stayed there right along. So finally her [Dorothy] up for a short time until the Mrs. had gotten well it would be nice providing that the girls [Conklins] would take with the Conklins in 1936 his wife "was sick and Betty thought Marks Hurtt testified that when Dorothy was sent to live as her sister Florence.

stated that she never had any discussion with the Conklins the Conklin girls in reference to the future of Dorothy" and school" or that she ever made "any agreements of any kind with remain with them during the entire period that she would go to she ever told "either of the Conklin girls that Dorothy could * * * were very bad and she was sick in bed." She denied that at that time; and that her husband's "financial circumstances to live with the Conklins in 1936 because she had six children Martin Hurtt testified that she permitted Dorothy to go

concerning those matters.

The evidence also discloses that Dorothy did not go to Ohio during the summer vacation period of 1942 because her mother and some other members of her family were then in Chicago; that from March, 1943 to June 28, 1943, Mrs. Hurtt was in Chicago working as a cashier at Mandel Brothers; and that during that period she frequently visited Dorothy and had her with her part of practically every week-end.

On May 19, 1943 Marks Hurtt wrote a letter to Dorothy, which was in part as follows:

"Well Dorthey your school will be out next month and I want you to come home for one month as you did not come Last summer and I am not any to well as I have told you I will send you a ticket and as you are 13 years old you can come all right then you can go back for the Balance of your vacation with in mind you have Plased your Father I can assure you will have a nice room up stairs and be treated as one of my children as you are I have not Been able to see you or have any time to spend with you But I am 58 years old and not any to well for what I have gone through with and I mite not Be able to stand this as I am pretty thinn 129 Pounds and I always was 135 to 138 so I want to Look forward to your home coming to Dadie if you still Love me But you talk this over with FB [Florence B. Conklin] and NM [Nellie M. Conklin] and make arrangements for that Date I can meet you at the train I will see you get Back all right as I am still Boss and will Be untill dead give Every body my Love and my very Best wishes and worlds of Love to all I am as Ever your Loeving Father.

Marks F. Hurtt

write when you can."

In response to the foregoing letter Dorothy wrote to her father agreeing to his plan and on June 14, 1943 he acknowledged her letter and said, "Come on the 26 of June and go Back as you said I will mail you some money next week I can asure you we will have a good time as they are plenty of room here." Later in the letter he said, "Just bring what you will need."

On June 28, 1943 Dorothy went with her mother to Geneva, Ohio. On June 30, 1943, Marks Hurtt wrote a letter to the Conklins in which, after indicating that there was considerable trouble in his home, he said: "She [Martha] said if things

concerning these letters.

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Ohio during the summer vacation period of 1943 because her

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Chicago; that from March, 1943 to June 28, 1943, Mrs. Hurtt

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which was in part as follows:

"Well Dorothy your school will be out next month and I want you to come home for one month as you did not come last summer and I am not any to well as I have told you I will send you a ticket and as you are 13 years old you can come all right then you can go back for the balance of your vacation with in mind you have pleased your father I can assure you will have a nice room up stairs and be treated as one of my children as you are I have not been able to see you or have any time to spend with you but I am 35 years old and not any to well for what I have gone through with and I will not be able to stand this as I am pretty thin 129 pounds and I always was 155 to 160 so I want to look forward to your home coming to Dadie I still love me but you talk this over with Ed [Lawrence E. Conklin] and MM [Mollie M. Conklin] and make arrangements for that date I can meet you at the train I will see you get back all right as I am still Boss and will be until dead give every body my love and my very Best wishes and words of love to all I am as ever your Loving Father.

Marks E. Hurtt

write when you can."

In response to the foregoing letter Dorothy wrote to her

father agreeing to his plan and on June 14, 1943 he acknowledged

her letter and said, "Come on the 16 of June and go back as you

said I will mail you some money next week I can assure you we

will have a good time as they are plenty of room here." Later

in the letter he said, "Just bring what you will need."

On June 28, 1943 Dorothy went with her mother to Geneva,

Ohio. On Jan 30, 1943, Marks Hurtt wrote a letter to the

Conklins in which, after indicating that there was considerable

trouble in his home, he said: "The [Mollie] said if things

don't turn different up there with Bill not Respectin Betty & children & Phyllis she was not going to Let Dorothy come Back I told her I will see to that when the time comes."

On July 13, 1943, Martha Hurtt wrote a letter to the Conklins, which is in part as follows:

"We have decided that D. E. is not coming back to Chicago. We are going to keep her here.

"After all Caroline & M. L. [Mary Lou] need some consideration - Caroline needs some one her own age - and I intend that Car & D. E. [Dorothy] grow up as sisters should. I told D. E. last night she wasn't going back, and I mean just that.

"D. E. is our daughter and I intend she will be raised like the rest and not feel she should be entitled more consideration than the rest."

Again on August 3, 1943, Martha Hurtt wrote the Conklins a letter in which she said:

"In answer to your letter the answer is still 'no.' I told you I intended having Dorothy. * * *

"This thing of one having more than the other and thinking they are entitled to more don't go around here and that's D. E. attitude. She keeps talking about the privileges and clothes, she gets up there. If she had such lovely clothes, I sure didn't see any, so she is going to accept things the same as Caroline. I don't intend to let Caroline go thru life thinking D. E. is better than she is or entitled to more than she is."

Before leaving Chicago with her mother in June, 1943, arrangements had been made for Dorothy's participation in a large church wedding ceremony. Upon their promise that Dorothy would be returned, she was permitted to visit the Conklins to take part in such ceremony. She stayed with them for about three weeks and during that time she pleaded with them to keep her. They told her that they had to return her to her parents' home because of their promise to do so.

There is undisputed evidence in the record that in October, 1943 Marks Hurtt stated that if Dorothy remained in Geneva, ^{and} she would never finish high school but that he had "washed his hands" of the whole affair and that perhaps if she did fail

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Committee, which is in part as follows:

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"In answer to your letter the answer is still 'no'.
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and clothes, she gets up there. If she had such lovely
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three weeks and during that time she pleaded with them to
keep her. They told her that they had to return her to her
parents' home because of their promise to do so.

There is undisputed evidence in the record that in October,
1943, Marka Hutt stated that if Dorothy remained in Geneva, who
she would never finish high school but that he had "washed his
hands" of the whole affair and that perhaps if she did finish

in her high school work then he could do something about it.

Dorothy testified in substance that the only home she had ever known was with the Conklins; that they had always taken care of her and been very good to her; that she had been taught to love her family and to respect them; that she loved her brothers and sisters; that she had gone through school in Chicago with many associates and had learned to care for them; that she had a real ambition to complete her education; that she had received piano lessons, a religious education and training in domestic duties; that she wanted with all her heart to return to the Conklins; that she had tearfully pleaded with her mother for permission to return, but was never given any answer but a flat "no"; that while she was in her parents' home between June and December, 1943 she saw and heard quarreling between her brother and mother, between her sisters and brother and between her father and mother; that on one occasion she heard the beginning of a violent argument in the upstairs bathroom between her father and mother and brother Lawrence but that she did not hear all of this argument because she and her sister were sent "uptown" so that they would not hear it; and that every night at bedtime she prayed that she might get back to the Conklin home.

On December 16, 1943 Marks Hurtt wrote a letter to the Conklins requesting them to invite Dorothy and her younger sister Caroline to come to Chicago for the Christmas holidays. This letter was in part as follows:

"I have not said a word about it as I have so much trouble here at home they surely dont care for anything and trys to Black me in ever way she [his wife] now has no use for Wilbert & now it is Dick and they Both are nice fellows * * * if they are a H it is down here * * * the fare is 16.28 round trip and I haven't got the money * * * my salary is now 34.94 after they take out taxes and 20 per cent my Grocery Bill here is 25.00 each week so I have 9.94 to pay Rint and coal Lights & Water so it will Be up to you to ask her if she

in her high school work then he could do something about it.
Dorothy resided in substance that the only home she
had ever known was with the Conlins; that they had always
taken care of her and been very good to her; that she had been
taught to love her family and to respect them; that she loved
her brothers and sisters; that she had gone through school in
Chicago with many associates and had learned to care for them;
that she had a real ambition to complete her education; that
she had received piano lessons, a religious education and
training in domestic duties; that she wanted with all her
heart to return to the Conlins; that she had tentatively
pleaded with her mother for permission to return, but was
never given any answer but a flat "no"; that while she was
in her parents' home between June and December, 1943 she saw
and heard travelling between her brother and mother, between
her sisters and brother and between her father and mother;
that on one occasion she heard the beginning of a violent
argument in the upstairs bedroom between her father and
mother and brother but that she did not hear all of
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Conlins requesting them to invite Dorothy and her younger
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This letter was in part as follows:
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trouble here at home they surely don't care for anything and
try to Black me in every way she [his wife] now has no use
for Wilbert & now it is Dick and they both are nice fellows
* * * if they are a N it is down here * * * the fare is 16.28
round trip and I haven't got the money * * * my salary is now
\$4.94 after they take out taxes and 25 per cent my grocery
bill here is 27.00 each week so I have 9.94 to pay Rent and
coal lights & water so it will be up to you to ask her if she

will let Dorthey and Carline come after Christmas * * *
really Girls I am in the Dog house sticking to Betty &
Wilbert Martha has got control and you will just haft
to Play it easy what you write."

The Conklins complied with his request and wrote Dorothy
inviting her and Caroline to come to Chicago during the Christ-
mas holidays. Her brother bill sent her a round trip ticket
and she and Caroline arrived at the Conklin home the Sunday
evening after Christmas. On the following Thursday Dorothy
had a talk with Florence and Nellie Conklin in which she asked
them if she could not remain with them. After consulting her
attorney Florence Conklin told Dorothy that they would do
what they could to keep her. Dorothy then wrote the following
letter to her parents:

"Dear Mother and Dad

"The more I have thought about going back to Geneva,
the more I have felt that I just can't do it. I have asked
Aunt Florence and Aunt Nellie if I can't stay with them,
and they say that they will be glad to have me.

"I hope that you won't be hurt over this and that you
will consent to my staying here. This has been my home for
so long that it seems much more like my real home. I really
tried very hard this fall to be happy with you and to be a
good girl, but I was so unhappy that I just can't go on.

"I want most of all to get a good education and to do
well in my school work. Here at Swift School I have always
done pretty well, but in Geneva I was failing, and I am
afraid that I would never get through high school there.
Here I can go on with my class, and I will certainly try to
do good work and to graduate.

"Although you don't [know] it, I cried myself to
sleep lots and lots of nights this fall, and I lost nearly
thirteen pounds in weight when I should have been growing
and gaining.

"Please, please say that it is all right for me to
stay and please don't blame anyone except me for my decision,
for this is really what I want most in the world.

"If you really love me, you will want me to be happy
and it will make me love you more, but, if I have to go
back to Geneva, I think I will just die.

"Lots of love to all,
Your loving daughter,
Dorothy.

P. S. Caroline will come home Sunday. Bill will have the
conductor look after her."

will let mother and Caroline come after Christmas * * * really girls, and in the dog house looking for Betty & Albert. I'll be in control and you will just wait to play it out you write."

The Caroline complied with his request and wrote Dorothy inviting her and Caroline to come to Ohio so during the Christmas holidays. Her brother Bill sent her a round trip ticket and she and Caroline arrived at the Conklin home the Sunday evening after Christmas. On the following Thursday Dorothy had a talk with Florence and Nellie Conklin in which she asked them if she could not remain with them. After consulting her attorney, Florence Conklin told Dorothy that they would do what they could to keep her. Dorothy then wrote the following letter to her parents:

Dear Mother and Dad

The more I have thought about going back to Geneva, the more I have felt that I just can't do it. I have asked Aunt Florence and Aunt Nellie if I can't stay with them, and they say that they will be glad to have me.

"I hope that you won't be over-joyed and that you will consent to my staying here. This has been my home for so long that it seems more like my real home. I really tried very hard this fall to be happy with you and to be a good girl, but I was so unhappy that I just can't go on.

I want most of all to get a good education and to do well in my school work. Here at Conklin school I have always done pretty well, but in Geneva I was failing, and I am afraid that I would never get through high school there. Here I can go on with my class, and I will certainly try to do good work and to graduate.

Although you don't [know] it, I cried myself to sleep lots of nights this fall, and I lost nearly fifteen pounds in weight when I should have been growing and gaining.

"Please, please say that it is all right for me to stay and please don't blame anyone except me for my decision, for this is really what I want most in the world.

"If you really love me, you will want me to be happy and it will make me love you more, but if I have to go back to Geneva, I think I will just die.

Lots of love to all,
Your loving daughter,
Dorothy.

P.S. Caroline will come home Sunday. Bill will have the car for her."

Shortly after her receipt of the foregoing letter from Dorothy, Mrs. Hurtt came to Chicago and lodged a complaint in the Juvenile court against the Conklins, charging them with contributing to the delinquency of Dorothy. Upon investigation said complaint was dismissed. On the Sunday prior to the day on which this habeas corpus proceeding was instituted, several of the adult members of the Hurtt family went to the Conklin home and Dorothy's father attempted to take her away by force but she succeeded in getting into the bathroom and locking the door. Some of the Hurtt's then attempted to force the door open by pushing and kicking it. Dorothy was screaming and the house was in an uproar, when defendants' attorney, who had been summoned by telephone, arrived and persuaded the Hurtt's to leave without Dorothy. A few days thereafter plaintiffs filed their complaint herein.

It is impossible within the confines of this opinion to recite in detail the evidence as to the almost constant trouble, quarreling, wrangling and bickering that occurred in the Hurtt home. As has been seen, in one of his letters to the Conklins Marks Hurtt described his home as being like a hell, principally because of his wife's conduct. This letter was written December 16, 1943, while Dorothy was at the Hurtt home and after she had been there more than five months. While Marks Hurtt professed in several letters to the Conklins and to Dorothy that he was the "boss" of his family, he never quite succeeded in being such. It clearly appears that when his wife refused to return Dorothy to the Conklins in the summer of 1943, Martha Hurtt was the dominating force in the home and Hurtt admitted that she was. She forced Dorothy to remain in Geneva, Ohio, notwithstanding her husband's specific and definite promise in his letters of May 19, 1943 and June 14, 1943 that she would be returned to the Conklins after she had

Shortly after her receipt of the foregoing letter from Dorothy, Mrs. Hunt came to Chicago and lodged a complaint in the juvenile court against the Conklins, charging them with contributing to the delinquency of Dorothy. Upon investigation a complaint was dismissed. On the Sunday prior to the day on which this habeas corpus proceeding was instituted, several of the adult members of the Hunt family went to the Conklin home and Dorothy's father attempted to take her away by force but she succeeded in getting into the bathroom and locking the door. Some of the Hunts then attempted to force the door open by pushing and kicking it. Dorothy was screaming and the house was in an uproar, when defendants' attorney, who had been summoned by telephone, arrived and persuaded the Hunts to leave without Dorothy. A few days thereafter plaintiffs filed their complaint herein.

It is impossible within the confines of this opinion to recite in detail the evidence as to the almost constant trouble, quarreling, wrangling and bickering that occurred in the Hunt home. As has been seen, in one of his letters to the Conklins Marks Hunt described his home as being like a hell, principally because of his wife's conduct. This letter was written December 16, 1945, while Dorothy was at the Hunt home and after she had been there more than five months. While Marks Hunt professed in several letters to the Conklins and to Dorothy that he was the "boss" of his family, he never quite succeeded in being such. It clearly appears that when his wife refused to return Dorothy to the Conklins in the summer of 1943, Marks Hunt was the dominant force in the home and Hunt admitted that she was. She forced Dorothy to remain in Geneva, Ohio, notwithstanding her husband's specific and definite promise in his letters of May 19, 1943 and June 14, 1943 that she would be returned to the Conklins after she had

spent the month of July, 1943 at his home.

Marks Hurtt earned meager wages and his family was more or less poverty stricken. He did not receive much, if any, help from his older children, because they married at an early age and left the home. Two of the daughters, Betty Jane and Martha Bell, married when they were 17 years old. Betty Jane was living with her husband at the time of the trial of this case but she had theretofore filed three suits for divorce against him, which she later dismissed. Martha Bell at the time of the trial was not living with her husband and had separated from him twice, although she had only been married a few months. Marks Hurtt wrote a letter to the Conklins in which he referred to a vicious quarrel in his home in 1943, while Dorothy was living there. This quarrel involved his three daughters, Betty Jane, Phyllis and Martha Bell. While it appears that Dorothy was not present at the time, the quarrel culminated in a brawl in which Phyllis and Martha Bell "beat up" Betty Jane.

According to Martha Hurtt, she was not on friendly terms with her oldest son Bill who had been raised by the Conklins, because of what she considered his wrongful attitude toward her and his lack of respect for his sisters, Betty Jane and Phyllis. She testified that she learned in the summer of 1943 that Bill got in trouble with three other boys in 1934 when he was a senior in high school and had been convicted of receiving a stolen automobile. The record of his conviction pursuant to which he was placed on probation was introduced in evidence on plaintiffs' behalf. This evidence could have been introduced for no other purpose than to smear Bill and in turn the Conklins. It was offered on the pretext that it tended to show that the Conklins did not raise Bill properly or he would not have become involved in the trouble that resulted in his conviction and that therefore they were not fit to have the custody of Dorothy. Bill was not

they were not fit to have the custody of Dorothy. Bill was not in the trouble that resulted in his conviction and that therefore did not raise Bill property or he would not have become involved offered on the pretext that it tended to show that the Conklins purpose than to smear Bill and in turn the Conklins. It was placed on probation was introduced in evidence on plaintiffs' automobile. The record of his conviction pursuant to which he in high school and had been convicted of receiving a stolen got in trouble with three other boys in 1934 when he was a senior She testified that she learned in the summer of 1943 that Bill and his lack of respect for his sisters, Betty Jane and Phyllis, because of what she considered his wrongful attitude toward her with her oldest son Bill who had been raised by the Conklins, according to Martin Hunt, she was not on friendly terms in which Phyllis and Martin Bell "beat up" Betty Jane, was not present at the time, the quarrel culminated in a brawl Jane, Phyllis and Martin Bell. While it appears that Dorothy living there. This quarrel involved his three daughters, Betty to a vicious quarrel in his home in 1943, while Dorothy was Marks Hunt wrote a letter to the Conklins in which he referred from him twice, although she had only been married a few months of the trial was not living with her husband and had separated against him, which she later dismissed. Martin Bell at the time case but she had theretofore filed three suits for divorce was living with her husband at the time of the trial of this Martha Bell, married when they were 17 years old. Betty Jane and age and left the home. Two of the daughters, Betty Jane and help from his older children, because they married at an early or less poverty stricken. He did not receive much, if any, James Hunt earned meager wages and his family was more spent the month of July, 1943 at his home.

a witness in this case but in her zeal to prevail in this litigation his mother made this unpardonable attack on him and the Conklins. Bill, who was married at the time of the trial and had two infant children and whose past conduct had been otherwise exemplary, was thus gratuitously besmirched by his own mother by her resurrection and introduction in evidence of the record of this forgotten incident of his boyhood.

On March 15, 1944, within 30 days after the entry of the judgment in this case awarding the custody of Dorothy to her parents, defendants filed a motion to reopen the hearing for the purpose of permitting them to introduce in evidence a letter written to them by Marks Hurtt on July 4, 1941, which letter, after inviting the Conklins to visit his home in Ohio with Dorothy, stated among other things:

"I have given Martha to understand that Dorthey is going to complete her school work & collage with you girls of Dorothy wants to and I know she does * * * Martha is all right untill Lawrence & Betty and the rest getting talking when I am at work. But Martha know right well now I will not stand for any more kid stuff as I will not live this way any longer as you girls have dont so much for us and with a Christian heart I can neaver forget * * * I dont think Martha some times is all there I am sorry to say with the kids trying to run things there way she is easy persuaded * * * Just bring what things Dorthey will need as she is going to Continue her shcool work with you girls, as you have spoken."

Since defendants' motion to reopen the hearing for the purpose of presenting in evidence the foregoing letter complied with all the legal requirements for the granting of such motion, the trial court erred in denying it. Not only did this letter constitute competent and material evidence but it has an important bearing on the issues involved herein and we will therefore consider it as part of the evidence in this case.

The theory of the Conklins as stated in their brief is that "the welfare and the best interests of the girl are controlling; that the original arrangement was that they were

a witness in this case who is not to prevail in this litigation is that this responsible attack on him and the Corlins, Bill, who was married at the time of the trial and had two infant children and whose past conduct had been otherwise exemplary, was thus gratuitously besmirched by his own mother by her reconstruction and introduction in evidence of the record of this forgotten incident of his boyhood.

On March 12, 1944, within 30 days after the entry of the judgment in this case awarding the custody of Dorothy to her parents, defendants filed a motion to reopen the hearing for the purpose of presenting them to introduce in evidence a letter written to them by Marks Smith on July 4, 1941, which letter, after inviting the Corlins to visit his home in Ohio with Dorothy, stated among other things:

"I have given Marks to understand that Dorothy is going to complete her school work & collage with you girls of Dorothy wants to and I know she does * * * * * that she is all right until Lawrence & Betty and the rest getting talking when I am at work, but Lawrence now right well now I will not stand for any more like stuff as I will not live this way any longer as you girls have done so much for me and with a Christian heart I can never forget * * * I don't think Marks some times is all he is I am sorry to say with the kids trying to run things there way she is easy persuaded * * * that being that thing Dorothy will need as she is going to continue her school work with you girls, as you have spoken."

Since defendants' motion to reopen the hearing for the purpose of presenting in evidence the foregoing letter complied with all the legal requirements for the granting of such motion, the trial court erred in denying it. Not only did this letter constitute competent and material evidence but it has an important bearing on the issues involved herein and we will therefore consider it as part of the evidence in this case. The theory of the Corlins as stated in their brief is that "the welfare and the best interests of the girl are controlling; that the original arrangement was that they were

to undertake to raise Dorothy and send her through school; that such agreements, while not absolutely binding, will be given great weight by the courts, especially when acted upon for many years, and when it appears to be for the best interests of the child that the agreement be carried out; that, while parents have a superior right to custody originally, that right may be lost (and in this case is lost) by permitting the child to be raised from infancy in another home, where ties of love and affection are formed, friendships made and cemented, and associations formed which cannot be broken without great harm to the child and great pain to both the child and to the persons who have expended their love and care and money upon the child"; and that "upon the evidence in this case, minds cannot differ upon the proposition that the best interests and welfare of the child demanded that she remain with the Conklins nor that her prayerful wishes were to stay here."

Plaintiffs' theory is that "as parents, they are entitled to the exclusive care and custody of their own child, that they are fit and proper persons to have her care and custody, and that they have not forfeited that right by any act of their own"; that "they have permitted Dorothy to reside with the defendants with the understanding that she return when requested; that when they learned of circumstances that led them to believe that Dorothy's character was being improperly molded and she was being estranged from the rest of her family, and when they received information defendants had concealed from them which convinced them that the Conklin home was not a proper home for Dorothy, and as their financial circumstances had changed for the better, they requested that Dorothy be returned to them, and she was so returned in compliance with

to undertake to raise Dorothy and send her through school; that such parents, while not absolutely binding, will be given great weight by the courts, especially when acted upon for many years, and when it appears to be for the best interests of the child that the agreement be carried out; that, while parents have a superior right to custody originally, that right may be lost (and in this case is lost) by permitting the child to be raised from infancy in another home, where ties of love and affection are formed, friendships made and cemented, and associations formed which cannot be broken without great harm to the child and great pain to both the child and to the persons who have expended their love and care and money upon the child; and that "upon the evidence in this case, minds cannot differ upon the proposition that the best interests and welfare of the child demanded that she remain with the confidante not that her proper wishes were to stay here."

Finally, they are entitled to the exclusive care and custody of their own child, that they are fit and proper persons to have her care and custody, and that they have not forfeited that right by any act of their own; that "they have permitted Dorothy to reside with the defendants with the understanding that she return when requested; that even the law of circumstances that led them to believe that Dorothy's character was being improperly molded and she was being estranged from the rest of her family, and when they received information defendants had concealed from them which convinced them that the confidante was not a proper home for Dorothy, and as their financial circumstances had changed for the better, they requested that Dorothy be returned to them, and she was so returned in compliance with

their agreement"; and that "subsequently, after Dorothy had been returned to plaintiffs, defendants did procure custody of Dorothy by means of a ruse and were thereafter improperly depriving plaintiffs of her custody."

It should be stated at this point that there is no evidence in the record that supports plaintiffs' theory of fact that while Dorothy was with the Conklins her "character was being improperly molded and she was being estranged from the rest of her family" or that "the Conklins' home was not a proper home for Dorothy." A complete answer to this portion of plaintiffs' theory is found in the opinion rendered by the trial judge giving the reasons for his decision, wherein he stated that the Conklins were "very fine, worthy people" and that they did "an excellent job with this girl." It should be further stated that there is no evidence in the record that the Hurttts or either of them "requested that Dorothy be returned to them" permanently in June, 1943, that "she was so returned in compliance with their agreement" or that thereafter the Conklins "did procure her custody by a ruse." It is undisputed that the Conklins did not turn Dorothy over to the Hurttts in June, 1943 in compliance with any agreement with them to do so and that neither of the Hurttts requested that Dorothy be returned to them permanently at that time. The fact is that when Dorothy's mother took her to Geneva, Ohio in June, 1943 it was upon the explicit promise of her father that she would be returned to the Conklins to continue her schooling in Chicago. If there was any ruse perpetrated in this case it was by Mrs. Hurtt in taking Dorothy to Geneva, Ohio under the pretext that she would be returned to Chicago and then forcing her to remain there, notwithstanding that her father had written her that he would send her back to

their agreement; and that "subsequently, after Dorothy had been returned to plaintiffs, defendants did procure custody of Dorothy by means of a ruse and were thereafter improperly depriving plaintiffs of her custody."

It should be stated at this point that there is no evidence in the record that supports plaintiffs' theory of fact that while Dorothy was with the Conklins her "character was being improperly molded and she was being estranged from the rest of her family" or that "the Conklins' home was not a proper home for Dorothy." A complete answer to this portion of plaintiffs' theory is found in the opinion rendered by the trial judge giving the reasons for his decision, wherein he stated that the Conklins were "very fine, worthy people" and that they did "an excellent job with this girl." It should be further stated that there is no evidence in the record that the Huttis or either of them "requested that Dorothy be returned to them" permanently in June, 1943, that "she was so returned in compliance with their agreement" or that thereafter the Conklins "did procure her custody by a ruse." It is undisputed that the Conklins did not turn Dorothy over to the Huttis in June, 1943 in compliance with any agreement with them to do so and that neither of the Huttis requested that Dorothy be returned to them permanently at that time. The fact is that when Dorothy's mother took her to Geneva, Ohio in June, 1943 it was upon the explicit promise of her father that she would be returned to the Conklins to continue her schooling in Chicago. If there was any ruse perpetrated in this case it was by Mrs. Hutt in taking Dorothy to Geneva, Ohio under the pretext that she would be returned to Chicago and then forcing her to remain there, notwithstanding that her father had written her that he would send her back to

the Conklins if she would spend the month of July with him in Ohio. Dorothy's father told her to get the permission of the Conklins to make this trip. Just a few days before Mrs. Hurtt took Dorothy to her home in June, 1943 she discussed with the Conklins the kind and color of dress that she should wear upon her graduation from grammar school in Chicago the following January. It might be added that the Hurtt's "financial circumstances" had not changed "for the better" in June, 1943, as they claim. As late as December, 1943, Marks Hurtt wrote the letter to the Conklins, heretofore set forth, in which he indicated that his financial affairs were in a very precarious condition.

The judgment order of the trial court was predicated primarily upon the theory that the family is the foundation of civilization, that its permanence and stability should be safe-guarded and that the technical legal right of plaintiffs to the custody of Dorothy was paramount and superior to her best interests and future welfare, unless the Hurtt's had forfeited this right by reason of their unfitness.

In our opinion the finding of the trial judge that there was nothing in the record "to indicate that either the father or mother ever intended to surrender the custody" of Dorothy to the Conklins is against the manifest weight of the evidence and it is also our opinion that the trial judge did not give proper consideration to the best interests of Dorothy and ignored her wishes and feelings in the matter, although she was the person whose welfare was most deeply involved in this proceeding.

Did plaintiffs agree that defendants were to have the custody of Dorothy until she completed her education? Marks Hurtt's testimony that his arrangement with the Conklins was that they should take Dorothy and keep her until such time as

the condition if she would spend the month of July with him in Ohio. Dorothy's father told her to get the permission of the condition to make this trip. Just a few days before the, Hurtt took Dorothy to her home in June, 1943 and discussed with the condition the kind and color of dress that she should wear upon her graduation from grammar school in Ohio on the following January. It might be added that the Hurtt's "financial circumstances" had not changed "for the better" in June, 1943, as they claim. As late as December, 1943, Hurtt wrote the letter to the condition, however, late as that, in which he indicated that his financial affairs were in a very precarious condition.

The judgment order of the trial court was predicated primarily upon the theory that the family is the foundation of civilization, that its permanence and stability should be safeguarded and that the technical legal right of plaintiff's to the custody of Dorothy was paramount and superior to her best interests and future welfare, unless the Hurtt's had forfeited this right by reason of their conduct.

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proper consideration to the best interests of Dorothy and removed her interests and feelings in the matter, although she was the person whose welfare was most deeply involved in this proceeding.

And plaintiffs agree that defendants were to have the custody of Dorothy until she completed her education. Hurtt's testimony that his arrangement with the condition was that they should take Dorothy and keep her until such time as

he requested her return was not only completely refuted by his own letters to the Conklins and to Dorothy, heretofore set forth, but these letters corroborated the testimony of the Conklins that when Dorothy was brought to them by Betty Jane in January, 1936, the arrangement with the Hurtt's was that they [the Conklins] were to care for and raise her at their own expense until she finished her schooling. Even after Dorothy was brought to the Hurtt home in Ohio by her mother in June, 1943 and Mrs. Hurtt decided to force her to remain there and as late as December, 1943, Hurtt wrote several letters which confirmed the Conklins' version of the arrangement under which they took Dorothy into their home. It is inconceivable that Marks Hurtt would testify as he did unless he thought that his letters to Dorothy and the Conklins were no longer in existence and that he could not be confronted with them. In view of Hurtt's letters the only reasonable explanation for his testimony in respect to his arrangement with the Conklins as to Dorothy is that his wife dominated and influenced him to the extent that he was even willing to commit perjury at her solicitation. Although Martha Hurtt testified that she was ill at the time and made no arrangement with the Conklins concerning their custody of Dorothy, the evidence conclusively shows that even though she did not herself make the arrangement which the Conklins testified she did, she acquiesced in same for more than seven and one half years and did not make up her mind to repudiate the arrangement until her animosity toward her son Bill and the Conklins, because of their continued friendship with him, prompted her to do so during the summer of 1943.

Prior to the time that Dorothy went to Ohio with her mother on June 28, 1943, Mrs. Hurtt admits that she neither suggested nor intimated to the Conklins that the child would

he requested her return was not only completely refuted by his own letters to the Conklins and to Dorothy, heretofore set forth, but these letters corroborated the testimony of the Conklins that when Dorothy was brought to them by Betty Jane in January, 1936, the arrangement with the Hurts was that they [the Conklins] were to care for and raise her at their own expense until she finished her schooling. Even after Dorothy was brought to the Hurt home in Ohio by her mother in June, 1943 and Mrs. Hurt decided to force her to remain there and as late as December, 1943, Hurt wrote several letters which confirmed the Conklins' version of the arrangement under which they took Dorothy into their home. It is inconceivable that Marka Hurt would testify as he did unless he thought that his letters to Dorothy and the Conklins were no longer in existence and that he could not be confronted with them. In view of Hurt's letters the only reasonable explanation for his testimony in respect to his arrangement with the Conklins as to Dorothy is that his wife dominated and influenced him to the extent that he was even willing to commit perjury at her solicitation. Although Marka Hurt testified that she was ill at the time and made no arrangement with the Conklins concerning their custody of Dorothy, the evidence conclusively shows that even though she did not herself make the arrangement which the Conklins testified she did, she acquiesced in same for more than seven and one half years and did not make up her mind to repudiate the arrangement until her animosity toward her son Bill and the Conklins, because of their continued friendship with him, prompted her to do so during the summer of 1943.

Prior to the time that Dorothy went to Ohio with her mother on June 28, 1943, Mrs. Hurt admits that she neither suggested nor intimated to the Conklins that the child would

not be returned to them and from January, 1936, when Dorothy was turned over to the Conklins to be raised by them, until Martha Hurtt advised Florence Conklin by letter on July 13, 1943 and again on August 3, 1943 that she was going to keep Dorothy, neither of Dorothy's parents had ever by letter or spoken word or by any act of theirs indicated an intention to retake the child or to assume the slightest burden with reference to her. Martha Hurtt also admitted upon the trial that she did not intimate or suggest to Dorothy prior to June 28, 1943, when she took her to Geneva, Ohio, that she would not be returned to the Conklins.

In plaintiffs' brief it seems to be conceded, in effect at least, that the evidence shows that Dorothy's father did agree that the Conklins should have custody of Dorothy until she finished her schooling but they say that "any act or representation by Marks Hurtt cannot therefore be construed to prejudice the rights of Martha Hurtt." As already stated, the evidence shows that Martha Hurtt was either a party to the arrangement or that she acquiesced in it with full knowledge of its intent and purpose.

In view of the testimony of the Conklins, the letters of Marks Hurtt corroborating their testimony and completely refuting his own testimony and Mrs. Hurtt's conduct in permitting Dorothy to remain with the Conklins without objection for more than seven and one half years, it must be held that the finding of the trial court that there was nothing in the record "to indicate that either the father or mother ever intended to surrender the custody" of Dorothy to the Conklins was against the manifest weight of the evidence.

The rules of law governing the right to the custody of children are well settled in this state but difficulty is

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In plaintiffs' brief it seems to be conceded, in effect at least, that the evidence shows that Dorothy's father did agree that the Comblins should have custody of Dorothy until she finished her schooling but they say that "any act or representation by Martha Hunt cannot therefore be construed to prejudice the right of Martha Hunt." As already stated, the evidence shows that Martha Hunt was either a party to the arrangement or that she acquiesced in it with full knowledge of its intent and purpose.

In view of the testimony of the Comblins, the letters of Martha Hunt corroborating their testimony and completely refuting his own testimony, and Mrs. Hunt's conduct in permitting Dorothy to remain with the Comblins without objection for more than seven and one half years, it must be held that the finding of the trial court that there was nothing in the record "to indicate that either the father or mother ever intended to surrender the custody" of Dorothy to the Comblins was against the slightest weight of the evidence.

The rules of law governing the right to the custody of children are well settled in this state but difficult to

often encountered in applying the law to the facts and circumstances of the particular case.

It has been repeatedly held that in controversies involving the custody of a child between its parents and other persons to whom its custody has been given by the parents, the welfare of the child is the matter of primary and paramount importance. (Sullivan v. The People, 224 Ill. 468; Cormack v. Marshall, 211 Ill. 519; People v. Porter, 23 Ill. App. 196.)

Of the numerous authorities cited by the parties in support of their respective positions we think that People v. Porter, 23 Ill. App. 196, presents a factual situation which most closely resembles that presented here. That was a habeas corpus proceeding brought by the father to recover the custody of his daughter, then eleven years of age, from Mr. and Mrs. Porter. The trial court remanded custody to the Porters and its judgment was affirmed by the Appellate court. In that case the mother died when the child was two years old and the father placed his infant daughter with the Porters. He contributed to her support for a period of about six years. The father then moved to Kansas and due to ill health was unable to further provide support. When the father suggested that he would find another home for the child in Kansas, the Porters agreed to keep her without expense until she was grown up. The Porters kept the daughter for more than two years under that agreement. Then the father remarried and sought custody of the child. There the court said at pp. 197-199:

"In controversies of this character, three matters are to be regarded: the rights of the parent, the rights and interests of the person or persons to whom the care and custody of the infant child has been given by the parent, and the welfare of the child; and of these three the last

often encountered in applying the law to the facts and circumstances of the particular case.

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mentioned is the matter of primary and paramount importance. The father is prima facie entitled to the custody of his minor child, but he may forfeit the right by misconduct or voluntarily relinquish it. If he, by agreement, surrenders the custody of his child to another, such surrender is not absolute and irrevocable; but, if a contention arises in the courts with reference to such relinquishment, much will depend upon the characters and habits of the contending parties, the fact whether the reclamation is sought within a short time or after the lapse of years, and the circumstances of the particular case. All other considerations, however, will be subordinated to the interest and welfare of the child.

"It appears from the evidence in the record before us that Mr. and Mrs. Porter are very worthy people and have taken excellent care of the little girl, and have great affection for her and are unwilling to part with her. The affections of the little girl are attached to them by bonds equally strong; she is happy and contented where she is, is desirous of remaining there, and to tear her away and send her to a distant State, and among strangers, would be a severe shock to her feelings, and might and probably would be a sacrifice of her future happiness.

"We do not agree with counsel for appellant that the wishes of the child, on account of her tender years and immature judgment, should not be considered by the court; she is a bright, intelligent girl eleven years of age, and is the person whose welfare is most deeply involved in the litigation, and it is but just that her wishes and feelings should be consulted, although, as a matter of course, not necessarily allowed to prevail.

"Where she is, her wants are all provided for, and her education is not neglected. It is true that the relator is her father, and the ties of blood should not be disregarded. It must be remembered, however, that she has been separated from her father since she was two years old, has seen him but seldom for many years, and that he is almost a stranger to her * * *.

"* * * He voluntarily gave the custody of his daughter to another, and even if this was more from necessity than choice, yet the facts remain that he has been separated from her for years, and that through his procurement, new ties, affections and interests have arisen, and his parental rights should not now outweigh all the other weighty considerations at stake."

We think that the law as enunciated in the Porter case is peculiarly applicable to the facts in this case and holding, as we do, that the Hurttis voluntarily relinquished the custody of Dorothy to the Conklins under an agreement whereby the latter undertook to raise the child at their own expense until she completed her education, the matter of controlling importance in this case is whether the interests and welfare of the child

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"It appears from the evidence in the record before us that Mr. and Mrs. Porter are very worthy people and have taken excellent care of the little girl, and have great affection for her and are unwilling to part with her. The affections of the little girl are attached to them by bonds deeply strong; she is happy and contented where she is, is desirous of remaining there, and to tear her away and send her to a distant state, and among strangers, would be a severe shock to her feelings, and might and probably would be a sacrifice of her future happiness.

"We do not agree with counsel for appellant that the wishes of the child, on account of her tender years and immature judgment, should not be considered by the court; she is a bright, intelligent girl eleven years of age, and is the person whose welfare is most deeply involved in the litigation, and it is but just that her wishes and feelings should be considered, although, as a matter of course, not necessarily allowed to prevail.

"There she is, her wants are all provided for, and her education is not neglected. It is true that the father is her father, and the ties of blood should not be disregarded, it must be remembered, however, that she has been separated from her father since she was two years old, has seen him but seldom for many years, and that he is almost a stranger to her * * *

"* * * He voluntarily gave the custody of his daughter to another, and even if this was more from necessity than choice, yet the facts remain that he has been separated from her for years, and that through his procurement, new ties, affections and interests have arisen, and his parental rights should not now outweigh all the other weighty considerations at stake."

"We think that the law as enunciated in the Porter case is peculiarly applicable to the facts in this case and holding, as we do, that the father voluntarily relinquished the custody of Dorothy to the Collins under an agreement whereby the latter undertook to raise the child at their own expense until she completed her education, the matter of controlling importance in this case is whether the interests and welfare of the child

would be better served in the Conklin home or in the home of her parents.

It is unnecessary to repeat the evidence showing the unwholesome atmosphere of the Hurtt home but even though their home were less turbulent and less "like a hell", as Marks Hurtt described it, her parents would not be entitled to her custody. They voluntarily relinquished the custody of Dorothy to the Conklins and thereby through their own procurement permitted her to be raised practically from infancy by defendants and to form home associations and ties of love and affection which could not be severed without marring the happiness of the child. Such ties could not be broken without great harm to the child and great pain to the child and the Conklins who had expended their time, love and money upon her. It was only natural that Dorothy, having lived with the defendants for more than seven and one half years, became attached and devoted to them and they to her.

Here we have a fourteen year old girl who was on the threshold of young womanhood virtually uprooted from the Conklin home where she was comfortable, happy and contented and living amongst congenial surroundings and compelled against her will to live in her parents' home, where she was continuously unhappy and emotionally upset. Her mother brusquely repulsed her repeated tearful requests to be returned to the Conklins. Mrs. Hurtt was not primarily concerned with the future happiness and education and the hopes and aspirations of Dorothy. Her position was and is simply that she was Dorothy's mother and Dorothy was her daughter and therefore she was entitled to her custody, even though it might blight her child's life to be compelled to remain in her home. If the statement in plaintiffs' brief that Dorothy is "a prim little prude" is any criterion of her mother's love and

would be better served in the Conklin home or in the home of her parents.

It is unnecessary to repeat the evidence showing the unholistic atmosphere of the Conklin home but even though their home were less turbulent and less "like a hell", as Marks said described it, her parents would not be entitled to her custody. They voluntarily relinquished the custody of Dorothy to the Conklins and thereby through their own government permitted her to be raised practically from infancy by defendants and to form home associations and ties of love and affection which could not be severed without marred the happiness of the child. Such ties could not be broken without great harm to the child and great pain to the child and the Conklins who had expended their time, love and money upon her. It was only natural that Dorothy, having lived with the defendants for more than seven and one half years, became attached and devoted to them and they to her. Here we have a fourteen year old girl who was on the threshold of young womanhood virtually uprooted from the Conklin home where she was comfortable, happy and contented and living amongst congenial surroundings and compelled against her will to live in her parents' home, where she was continually unhappy and emotionally upset. Her mother repeatedly repudiated her repeated tearful requests to be returned to the Conklins. Mrs. Conklin was not primarily concerned with the future happiness and education and the hopes and aspirations of Dorothy. Her position was and is simply that she was Dorothy's mother and Dorothy was her daughter and therefore she was entitled to her custody, even though it might blight her child's life to be compelled to remain in her home. If the statement in "Little Prides" that Dorothy is "a little pride" is any criterion of her mother's love and

affection for her, then this child should certainly not be subjected to Mrs. Hurtt's custody.

Dorothy was an intelligent child who had had the opportunity of evaluating both homes and under the law and the facts and circumstances in evidence her understanding and considered preference to remain with the Conklins was entitled to considerable weight. That the trial judge ignored the attitude and wishes of Dorothy is evidenced by the following excerpt from his opinion: "After all, no matter what she wants, Marks Hurtt and his wife have custody of the child, if they have done all they could, and I believe they have given her and the other children the best they could, under the circumstances." There is no question in this case as to whether the Hurtt's did all they could for the other children. They did not do anything at all for Dorothy since she was six years old, when by their own procurement they had the Conklins take her into their home to raise.

As we view the decree of the trial court, it regarded nothing but the strict legal right of the parents and discarded as immaterial the circumstances under which Dorothy was brought into the home of the Conklins and kept and cared for by them since she was six years old. The trial judge failed to give proper consideration to the fact that all that Dorothy knew of home and family ties grew up with the parental care bestowed upon her by the Conklins and he also failed to give proper consideration to the attitude and wishes of Dorothy who was of an age and capacity to make a sensible choice between the respective homes.

This case is peculiar and unusual in that Mrs. Hurtt does not even claim that Dorothy's interests and welfare will be best served if she is given her custody. Although Dorothy was originally turned over to the Conklins so that she would

affection for her, from this child should certainly not be subjected to Mrs. Hunt's custody.

Dorothy was an intelligent child who had the opportunity of visiting both homes and under the law and the facts and circumstances in evidence her understanding and common sense presence to remain with the Conklins was entitled to considerable weight. That the trial judge ignored the evidence and found of Dorothy is evidenced by the following except from his opinion: "After all, no matter what she wants, Martha Hunt and her will have custody of the child, if they have done all they could, and I believe they have given her and the other children the best they could under the circumstances." There is no question in this case as to whether the Hunt's all they could for the other children. They did not do anything at all for Dorothy since she was six years old, when by their own procurement they had the Conklins take her into their home to raise.

As to who the owner of the child is, it regarded nothing but the strict legal right of the parents and dis- carded as immaterial the circumstances under which Dorothy was brought into the home of the Conklins and kept and cared for by them since she was six years old. The trial judge failed to give proper consideration to the fact that all that Dorothy knew of home and family life grew up in the parental care bestowed upon her by the Conklins and he also failed to give proper consideration to the attitude and wishes of Dorothy who was of an age and capacity to take a sensible choice between the two respective homes.

This case is peculiar and unusual in that Mrs. Hunt does not even claim that Dorothy's interests and welfare will be best served if she is given her custody. Although Dorothy was originally turned over to the Conklins so that she would

receive advantages that she could not possibly have in the Hurtt home, Mrs. Hurtt wrote the Conklins in July and August, 1943 after she had refused to return Dorothy to them, that she did not want Dorothy to have any more advantages or consideration than her other children were receiving in her own home. On June 30, 1943, two days after Mrs. Hurtt brought Dorothy to Geneva, Ohio, Marks Hurtt wrote the Conklins that his wife said to him that "if things dont turn different up there with Bill not Respectin Betty & children & Phyllas she was not going to Let Dorthey come Back." When Mrs. Hurtt was interrogated on her cross-examination as to whether she made this statement to her husband she did not deny making it. Thus it appears that instead of considering Dorothy's future welfare she subordinated same to her desire to "get even," as it were, with her son Bill and the Conklins and to punish Dorothy.

In People v. Weeks, 228 Ill. App. 262, the child's mother died shortly after her birth and thereafter when she was about two years old her father turned her over to his sister to raise without any definite arrangement as to her custody. The child remained with her father's sister until she was twelve years old and in eighth grade at school. Then the father who had remarried instituted a habeas corpus proceeding to secure the custody of the child. In that case the judgment order of the trial court was reversed and the cause was remanded with directions that the child be remanded to the custody of her aunt. There, after reviewing numerous authorities on the subject, the court said (p. 271) that "notwithstanding the seemingly rigorous expression of the law as it is set forth in the statute, the court may, in determining the right of a parent to the custody of his child, give greater heed to the welfare of the child than to the

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law as it is set forth in the statute, the court may, in
determining the right of a parent to the custody of his child,
give greater heed to the welfare of the child than to the

natural right of the parent; in other words, although the parent is morally and pecuniarily fit, if it appears reasonably certain, considering all the circumstances, that it would be better for the welfare of the child that it should remain with a third person, the parent's natural rights must give way."

A careful analysis of all the evidence in the record compels the conclusion that Martha Hurtt was a domineering woman, that she was the dominating force in her family, that she was principally responsible for the unpleasant, unhappy and unwholesome atmosphere of her home and that she was temperamentally unfit to have the custody of Dorothy. As to Marks Hurtt it is sufficient to say that his own letters recognized the right of the Conklins to the custody of Dorothy until she completed her education and said letters also recognized that the child's interests and welfare would be best served by remaining in the Conklin home.

We are impelled to hold that the trial court erred in awarding the custody of Dorothy Ellen Hurtt to her parents and for the reasons stated herein the judgment order of the Superior court of Cook county is reversed and the cause is remanded with directions that Dorothy Ellen Hurtt be remanded to the custody of Florence B. Conklin and Nellie M. Conklin and that the complaint of plaintiffs, Marks Hurtt and Martha Hurtt, be dismissed.

JUDGMENT ORDER REVERSED AND
CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

natural right of the parent; in other words, although the parent is morally and pecuniarily fit, it appears reasonably certain, considering all the circumstances,

that it would be better for the welfare of the child that it should remain with a third person, the parent's natural rights must give way."

A careful analysis of all the evidence in the record compels the conclusion that Martha Hunt was a dominating woman, that she was the dominating force in her family, that she was principally responsible for the unpleasant, unhappy and unwholesome atmosphere of her home and that she was temperamentally unfit to have the custody of Dorothy. As to Marks Hunt it is sufficient to say that his own letters recognized the right of the Comblins to the custody of Dorothy until she completed her education and said letters also recognized that the child's interests and welfare would be best served by remaining in the Comblin home.

We are impelled to hold that the trial court erred in awarding the custody of Dorothy Ellen Hunt to her parents and for the reasons stated herein the judgment order of the Superior court of Cook county is reversed and the case is remanded with directions that Dorothy Ellen Hunt be committed to the custody of Lawrence E. Comblin and Willie M. Comblin and that the complaint of plaintiffs, Marks Hunt and Martha Hunt, be dismissed.

APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY
CAUSE REMOVED WITH DIRECTIONS

Trinity, J. J., and Seaman, J., concur.

Ag. No. 6.

SECOND DISTRICT

328 I.A. 315

Alexander Haddad, as Administrator)
of the Estate of Mary K. Haddad,)
deceased.)

Appellant,

vs.

George Marble and Mary Marble,
Appellees.

Appeal from
Circuit Court,
Winnebago County.

WOLFE, --- P. J.

On March 27, 1944, Alexander Haddad, as Administrator of the Estate of Mary K. Haddad, deceased, filed a petition in the Probate Court of Winnebago County, praying for a citation against George Marble and Mary Marble to require them to answer certain interrogatories to be propounded to them concerning certain household goods and property which the petition alleged belonged to the Estate of Mary K. Haddad, deceased. The property consisted of household goods in a rooming house of 21 rooms. The furniture in each room is described in detail in the petition.

It is further alleged in the petition that the Marbles have in their possession, all of said property, and refuse to

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IN THE

SUPREME COURT OF THE DISTRICT OF COLUMBIA

3881A.815

SECOND DIVISION

ORDER OF THE COURT

...

Alexander, as Administrator
of the Estate of Mary A. Ladd, deceased,
Appellant,
vs.
George Ladd and Mary Ladd,
Appellees.

Present in the
District Court,
Washington, D.C.

WITNESSES: P. J.

On March 27, 1944, Alexander Ladd, as Administrator of the Estate of Mary A. Ladd, deceased, filed a petition in the Probate Court of Washington County, praying for a citation against George Ladd and Mary Ladd to produce to the court certain household goods and property which the petition alleged belonged to the Estate of Mary A. Ladd, deceased. The property consisted of household goods in a rooming house at 2100 E. The petition is set forth in detail in the petition. It is further alleged in the petition that the Ladds have in their possession, all of said property, and refuse to

2.

turn it over to the Administrator of Mary K. Haddad, deceased. It is also alleged that they have collected, at various times from the tenants of the rooming house, large sums of money to-wit, \$4,000.00, which they have in their possession, and control, or have embezzled the same; that the same money belongs to the Estate of Mary K. Haddad, deceased.

A citation was issued and the respondents, George Marble and Mary Marble filed an answer to the petition in which they admitted they had in their possession, the household goods described in the petition, and admitted they had refused to deliver the same to the petitioner, but denied that the deceased was the owner of the property at the time of her death. They also denied having in their possession any money that belonged to Mary K. Haddad at the time of her death.

Upon a hearing in the Probate Court, an order was entered finding the issues for the respondents, and that they did not have any property in their possession belonging to Mary K. Haddad at the time of her death, and at the time of the hearing did not have any property belonging to her estate. The Court dismissed the petition at the costs of the petitioner.

The petitioner perfected an appeal to the Circuit Court. A trial denovo was had in that Court. The cause was submitted to the Court for determination, which resulted in a similar order, finding that the petitioner had failed to prove that the property described in the petition, was an asset of the estate of the decedent at the time of her death. The petition was dismissed.

turn it over to the Administrator of Henry E. Hilditch, deceased.
 It is also alleged that they have collected, at various times
 from the tenants of the rented houses, large sums of money
 to-wit, \$1,000.00, which they have in their possession, and
 control, or have expended the same; that the same money belongs
 to the estate of Henry E. Hilditch, deceased.

A citation was issued and the respondents, George Hilditch
 and Mary Hilditch filed in answer to the petition in which they
 admitted they had in their possession, the household goods con-
 tained in two petitions, and admitted they had refused to deliver
 the same to the petitioner, and denied that she succeeded in the
 owner of the property at the time of her death. They also denied
 having in their possession any money that belonged to Henry E.
 Hilditch at the time of her death.

Upon a hearing in the Probate Court, an order was entered
 finding the answer for the respondents, and that they did not
 have any property in their possession belonging to Henry E. Hilditch
 at the time of her death, and at the time of the hearing did not
 have any property belonging to her estate. The Court dismissed
 the petition at the costs of the petitioner.

The petitioner perceived an appeal to the Circuit Court.
 A trial de novo was had in that Court. The cause was submitted
 to the Court for determination, which resulted in a similar order,
 finding that the petitioner had failed to prove that the property
 described in the petition, was an asset of the estate of the
 decedent at the time of her death. The petition was dismissed.

3.

From that order, an appeal has been prosecuted to this Court.

The errors relied upon for reversal, are as follows:

1. The Court erred in finding the issues for the respondents.
2. The Court erred in admitting immaterial and irrelevant evidence over the objections of Petitioner-appellant. The appellant has not seen fit to argue the second assignment of error, so the same is waived, leaving only a question of fact to be decided by this Court.

There is no evidence whatsoever, to sustain the charge of the petitioner that the appellees had \$4,000.00, or any other sum of money in their possession, which had belonged to Mary K. Haddad at the time of her death.

The evidence shows that Mary K. Haddad purchased the property in question, from one, John A. Thomas and then Mrs. Haddad rented the furniture to the Marbles. It appears from the evidence that James Haddad was the husband of Mary Haddad, and that until sometime in 1936, they resided at Rockford, Illinois, after which time James Haddad lived in Chicago. James Haddad started to collect the rent on this property sometime during the year 1936. Sometime during that year, James Haddad and Mary K. Haddad were divorced and about 6 months later were remarried. During the time that they were divorced, James Haddad collected the rent from the Marbles and gave receipts in his own name for the same, and this procedure continued up until the time of the death of Mrs. Haddad. According to the testimony of Mr. James Haddad, he turned all payments

From that order, an appeal has been presented to this Court. The errors relied upon for reversal, are as follows:

1. The Court erred in finding the issues for the respondents.
2. The Court erred in admitting immaterial and irrelevant evidence over the objections of petitioner-appellant. The appellant has not seen fit to argue the second assignment of error, so the same is waived, leaving only a question of law to be decided by this Court.

There is no evidence whatsoever, to sustain the charge of the petitioners that the appellant had \$4,000.00 of any other sum of money in their possession, which had belonged to Mary A. Haddad at the time of her death.

The evidence shows that Mary A. Haddad purchased the property in question, from one, John A. Thomas and then Mrs. Haddad rented the premises to the Harboles. It appears from the evidence that James Haddad was the husband of Mary Haddad, and that until sometime in 1933, they resided at Rockford, Illinois, after which time James Haddad lived in Chicago. James Haddad attempted to collect the rent on this property sometime during the year 1933. Sometime during that year, James Haddad and Mary A. Haddad were divorced and about a month later were remarried. During the time that they were divorced, James Haddad collected the rent from the Harboles and have received in his own name for the same, and this procedure continued up until the time of the death of Mrs. Haddad. According to the testimony of Mr. James Haddad, he turned all payments

that he received, over to Mrs. Haddad. The payments were mailed to James Haddad in Chicago, and he in return, (so he claims,) sent the money back to Rockford to Mrs. Haddad. The evidence further shows that he continued to collect from the Marbles after Mrs. Haddad died, and so continued for several years after the administrator had been appointed in Mary Haddad's estate.

On September 26, 1939, James Haddad entered into a written agreement whereby he confirmed a verbal discussion in reference to the sale of this property to the Marbles, the sale price being \$2,500.00. By the terms of the sale, after paying all bills such as rent, light, heat and water, all of the remaining income from the property was to be paid to James Haddad. In no event the payments should be less than \$40.00 per month. The Marbles paid various amounts until Nov. 15, 1941, when Mr. George Marble wrote to Mr. Haddad in Chicago, informing him that the purchase price on the contract had been reduced until there was only \$91.00 plus, due on the contract; that he wished to make this final payment in person, and get the bill of sale that was promised him for the goods.

On Nov. 18, 1941, Mr. Haddad wrote the Marbles acknowledging the receipt of the letter of the 15th, but advised the Marbles that his attorney insisted that there never was a sale, and that the letter in the Marble's possession is not a bill of sale, and that he would be in Rockford within a short time to talk to the Marbles further on the subject.

that he received, over to Mrs. Haddad. The payments were
made to James Haddad in Chicago, and he in return, (as he
claims), sent the money back to Rockford to Mrs. Haddad. The
evidence further shows that he continued to collect from the
Harples after Mrs. Haddad died, and so continued for several
years after the administration had been appointed in Mrs.
Haddad's estate.

On September 28, 1939, James Haddad entered into a
written agreement whereby he confirmed a verbal discussion in
reference to the sale of this property to the Harples, the sale
price being \$2,500.00. By the terms of the sale, after paying
all bills such as rent, light, heat and water, all of the re-
maining income from the property was to be paid to James Haddad.
In no event the payments should be less than \$40.00 per month.
The Harples paid various amounts until Nov. 15, 1941, where-
upon George Harple wrote to Mr. Haddad in Chicago, informing him
that the purchase price on the contract had been reduced until
there was only \$21.00 plus, due on the contract; that he wished
to make this final payment in person, and get the bill of sale
that was promised him for the goods.

On Nov. 15, 1941, Mr. Haddad wrote the Harples ac-
knowledging the receipt of the lesser of the bill, but advised
the Harples that his attorney insisted that there was a
bill of sale, and that the lesser in the Harples's possession is not a
bill of sale, and that he would be in Rockford within a short
time to take to the Harples further on the subject.

An examination of the abstract and the additional abstract shows the payments which the Marbles made to James Haddad. He states in his testimony that he turned this money over to Mary Haddad shortly after it was received by him. If this is so, she certainly had notice that these payments were not the ordinary payments for rent for the premises in question. If Mary Haddad were really the owner of these furnishings, it seems strange that James Haddad would collect the rents, etc., from the Marbles after he and his wife were divorced. It also seems unreasonable that he should continue to collect the payments from the Marbles after the death of Mary Haddad, and especially so, after the administrator had been appointed to take charge of the estate; also strange that no effort has been made for the return of the money paid to James Haddad since the death of his wife. We agree with the trial court when he states: "So, it seems to me, in view of the making of the lease, in view of the sale, that can't be disputed, that the petitioners have failed to prove, by a preponderance of the evidence that the title was in Mary Haddad at the time of her death. All the inferences that can be drawn, from the written documents filed here lead to that conclusion and the acts of James Haddad certainly lead to that and there is a reasonable inference that if Mary Haddad knowingly consented to the transfer of this lease or the releasing of it to the respondents, that she knew everything that was going on and consented to the leasing of this property to the respondents."

An examination of the abstract and the additional
abstract shows the payment which the ladies made to James
Madison. He states in his testimony that he turned this money
over to Mary Madison shortly after it was received by him. It
this is so, and certainly had notice that these payments were
not the ordinary payments for rent for the premises in question.
If Mary Madison were really the owner of those premises, it
seems strange that James Madison would collect the rent, etc.,
from the ladies after he and his wife were divorced. It also
seems unreasonable that he should continue to collect the pay-
ments from the ladies after the death of James Madison, and
especially so, after the administrator had been appointed to
take charge of the estate; also strange that no effort was
been made for the return of the money paid to James Madison
since the death of his wife. We agree with the trial court
when it states: "So, it seems to me, in view of the facts of
the case, in view of the law, that said debt should be
the petitioners have failed to prove, by a preponderance of
the evidence that said debt was in Mary Madison at the time
of her death. All the evidence that can be shown, from the
written documents filed here lead to that conclusion and the
acts of James Madison certainly lead to that and there is a
reasonable inference that if Mary Madison knowingly consented
to the payment of this loan on the releasing of it to the
respondents, that she knew everything that was going on and
consented to the issuing of this property to the respondents."

6.

The Judge of the Probate Court, and the Judge of the Circuit Court saw and heard the witnesses testify in this case, and they were in a much better position to test the credibility of these witnesses than a Court of review. The law has committed to the trial judge, where a cause is tried by the court without a jury, the determination of the credibility of the witnesses and of the weight to be accorded to their testimony, and where the evidence is merely conflicting the Appellate Court will not substitute its judgment for that of the trial court.

From a review of the evidence in this case, it is our conclusion that the petitioner failed to prove by the greater weight of the evidence, that the estate was entitled to the property in question. The order dismissing the petition of appellant is affirmed.

Affirmed.

The first of the two questions is, whether the evidence is sufficient to establish the fact in issue. The second is, whether the evidence is sufficient to establish the fact in issue. The first of the two questions is, whether the evidence is sufficient to establish the fact in issue. The second is, whether the evidence is sufficient to establish the fact in issue.

From a review of the evidence in this case, it is clear that the evidence is sufficient to establish the fact in issue. The evidence is sufficient to establish the fact in issue. The evidence is sufficient to establish the fact in issue.

Respectfully,
[Signature]

Gen. No. 10039

Ap. 3

ABSTRACT
IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, A.D. 1946

FRED S. RICHCREEK,
Plaintiff-Appellee,)
vs)
CITY OF ROCK ISLAND, a Municipal)
Corporation,)
Defendant-Appellant.)

Appeal from
Circuit Court of
Rock Island County

328 I.A. 316¹

Bristow, J.

This appeal is from a judgment rendered upon a verdict of a jury returned in the Circuit Court of Rock Island County, in favor of plaintiff Fred S. Richcreek, appellee, against the defendant, City of Rock Island, a municipal corporation, appellant. The verdict was for \$10,000.00. A remittitur was ordered by the trial court and judgment was entered in the amount of \$7500.00.

The plaintiff received personal injuries from a fall sustained while he was walking north on a brick sidewalk on East 23rd Street in said city on the evening of December 1, 1940.

The complaint charged that the side walk was out of repair at the place of said fall in that it had large holes, depressions and broken places; that the city had permitted ice and snow to accumulate, causing hills, depressions, fills, holes and uneven places in said snow and ice; that plaintiff stepped, walked or slipped into said hills, holes and depressions and was thereby violently thrown to the ground receiving a spiral fracture of his right leg between the knee and ankle.

The City of Rock Island contends that the condition which caused the addident was due to^a/slippery surface resulting from snow and ice, and

Sept. 10, 1903

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APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

VERDICT, A.D. 1903

Small from
of this Court of
Cook Island County

329 LA 318

THE PEOPLE OF THE COUNTY OF COOK, ILLINOIS,
vs.
THE CITY OF CHICAGO, ILLINOIS,
a corporation.

This cause came on for trial at the Court of the Second District of the Appellate Court of Illinois, in and for Cook County, Illinois, on the 10th day of September, 1903, at Chicago, Illinois, before the Honorable the Chief Justice of the Appellate Court, and the Honorable the Justices of the Appellate Court, sitting in open court, and the cause was argued by the counsel for the City of Chicago, and the counsel for the People of Cook County, Illinois, and the cause was submitted to the jury, and the jury returned a verdict in favor of the City of Chicago, and against the People of Cook County, Illinois, for the sum of \$100,000.00.

The City of Chicago, Illinois, is a corporation organized under the laws of the State of Illinois, and is a city of the County of Cook, Illinois, and is a city of the State of Illinois, and is a city of the United States of America, and is a city of the world.

The City of Chicago, Illinois, is a city of the County of Cook, Illinois, and is a city of the State of Illinois, and is a city of the United States of America, and is a city of the world. The City of Chicago, Illinois, is a city of the County of Cook, Illinois, and is a city of the State of Illinois, and is a city of the United States of America, and is a city of the world. The City of Chicago, Illinois, is a city of the County of Cook, Illinois, and is a city of the State of Illinois, and is a city of the United States of America, and is a city of the world.

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that such does not constitute actionable negligence. Appellant further contends that the verdict is manifestly against the weight of the evidence.

Plaintiff Richcreek testified that the brick sidewalk upon which he walked to the place where he fell was smooth, and about the same as concrete; that, when he came to the place of the hole which was about 5 inches deep and 12 to 14 inches wide, all at once his foot stepped, slipped or went into a hole or caught on an obstruction there; and that he fell forward, breaking his leg; that he lay there unable to arise for about five minutes. He was picked up by three men he called, and was carried on the back of one of them across the street. He stated there was a slight skiff of snow on the ground; that he had no knowledge of the depression or hole; and that he saw the place later when there was no snow.

A witness who had passed over this walk for many years likewise described the condition. He said that across this walk were two deep tracks where the bricks were pressed down into ruts because of vehicles having been driven over the walk. He said that on the west side or street side of the walk, the depressions were five to six inches deep and twelve to fourteen inches wide, tapering to the east side of the walk; that the beginning or deep part of the north rut was about a foot from a tree, which was the location of the plaintiff's fall. This witness testified that he saw the place shortly after the accident; that this walk had been cleared of snow; that there probably was a little ice and snow there but he did not know how much. Another witness who lived close by said that the depressions had been made because of loaded coal trucks from the street crossing the walk to the east, and that there were ruts which led to the tree.

For the defendant, a police officer testified that the place was smooth; that the defect was covered with ice and snow. A number of officers of the city testified. One testified that he didn't notice or observe any holes or ruts in the sidewalk except that he noticed a little hump over the roots of a tree. Another police officer said he didn't notice any depression or any ruts in the sidewalk. Still another witness testified that the following day there were ashes there, and that the holes were

that such does not constitute actionable negligence. Appellant further contends that the verdict is manifestly against the weight of the evidence. Plaintiff Nicholas testified that the brick sidewalk upon which he walked to the place where he fell was smooth, and about the same as concrete; that when he came to the edge of the hole which was about 5 inches deep and 14 to 16 inches wide, all at once his foot stepped, slipped or went into a hole or caught on an obstruction there; and that he fell forward, breaking his leg; that he lay there unable to arise for about five minutes. He was picked up by three men he called, and was carried on the back of one of them across the street. He stated there was a slight skiff of snow on the ground; that he had no knowledge of the depression or hole; and that he saw the place later when there was no snow.

A witness who had passed over this walk for many years likewise described the condition. He said that someone this walk were two deep tracks where the bricks were pressed down into rut because of vehicles having been driven over the walk. He said that on the west side of the street side of the walk, the depressions were five to six inches deep and twelve to fourteen inches wide, tapering to the east side of the walk; that the beginning of each part of the north rut was about a foot from a tree, which was the location of the plaintiff's fall. This witness testified that he saw the place shortly after the accident; that this walk had been clear of snow; that there probably was a little ice and snow here but he did not know how much. Another witness who lived close by said that the depressions had been made because of loaded coal trucks from the street crossing the walk to the east, and that there were ruts which led to the trees.

On the defendant, a police officer testified that the place was smooth; that the defect was covered with ice and snow. A number of officers of the city testified. One testified that he didn't notice or observe any holes or ruts in the sidewalk except that he noticed a little hump over the roots of a tree. Another police officer said he didn't notice any depression or any ruts in the sidewalk. Still another witness testified that the following day there were ashes there, and that the holes were

filled with ice and snow. We do not find in the record any testimony as to whether there was any further snow fall the night after the accident, whether the ashes were put on afterwards, or whether there was any change in the condition of the walk. There was a sharp conflict between the evidence offered on behalf of the appellee and the appellant pertaining to the condition of the sidewalk on the date of the alleged occurrence. It was peculiarly within the province of the jury to determine where the preponderance of the evidence lay. We do not believe the jury's determination of this issue in favor of the plaintiff should be disturbed. Mueth vs Jaska 302 Ill.App. 289, 294; Emge vs Illinois Central Railroad Company, 297 Ill. App. 344; Adamsen vs Magnolia, 286 Ill. App. 412, 421. There may be liability because of defects or obstructions on a walk, and there may also be present additional hazards, such as snow and ice which join in causing an injury. Bibbins vs City of Chicago, 193 Ill. 359, 361; Richmond vs City of Marseilles, 190 Ill. App. 227; City of Chicago vs Chase, 33 Ill. App. 551; Lueking vs City of Sedalia, 167 S.W. (Missouri) 1152, 1153.

Defendant contends that the verdict of the jury and judgment is grossly excessive. The undisputed testimony shows that the plaintiff was a plumber whose earnings had been as high as \$4500.00 a year up to five months before the date of the accident. Six months after the accident he attempted to work. After trying to work for three days, a knot appeared at the break of the leg. The skin broke at this point, and serum and pus was discharged. Mr. Richcreek's leg was again treated, elevated and a hip cast was placed on him which remained for seven weeks. He began working steadily the following October. Since then he has not been able to perform the heavy duties in his business which he had performed before the injury was received. During the treatment, several screws were inserted to hold the various parts of the fractured leg in place. He was in a hospital in Rock Island for 13 days where braces and a cast were placed on the broken member. And later, in April, he entered Cook County Hospital for further treatment which lasted six days, and during which time three of the screws were removed. One of the screws broke and still remains in the leg. Richcreek suffered

much pain, and at the time of the trial, three and a half years later, his leg was still causing him trouble. The hospital and doctor bills were \$230.00.

Instruction No. 2 given on behalf of the plaintiff, advised the jury that the law required the city to use reasonable care to keep the public sidewalk at the place in question in a reasonably safe condition for the safety of persons passing over the same. The appellant claims that the abstract instruction is misleading, and that the giving of it is reversible error. Defendant in its instructions No. 13 and No. 14 tendered and given advised the jury of the same duty. Instruction No. 2 was not a directory instruction. The jury was very fully instructed in this case. Instructions are to be read as a series. Where a defendant in its tendered instruction asks the jury to be instructed in a like manner as in an instruction given for plaintiff, such defendant cannot complain of plaintiff's instructions. Jones vs Standerfer, 296 Ill.App.149; McInturff vs The Insurance Company of North America, 248 Ill. 92, 99.

Appellant contends that the trial court erred in not granting a new trial because it was discovered after the verdict that one of the jurors had been convicted of grand larceny and had not been restored to his legal rights. This fact was not known to defendant's attorney until two days after the verdict was returned. The record does not show any questions were propounded to this or any juror on the voir dire. There is no contention that this juror was asked concerning such and made false answers to interrogatives. Appellant contends that under Section 7, Division II of the Criminal Code of Illinois, such convicted person was thereby rendered incapable of serving as a juror. Appellant cites and quotes numerous cases of foreign jurisdiction some of which so hold and some of which hold contrary to the ruling of the courts of appeal of Illinois.

Appellant contends that by virtue of the Common Law Rule, this juror was subject to challenge by propter delictum on account of criminality, and that whether attempt was made on the voir dire to learn of such conviction is not material, but that such fact afterwards discovered demands reversal.

Appellee cites many cases from foreign jurisdictions holding to

Appellate cites many cases from foreign jurisdictions holding to

is not material, but that such fact afterwards discovered renders

that whether the point was made on the voir dire to learn of such convic-

was subject to challenge by proper objection on account of criminality,

Appellant contends that by virtue of the Common Law Rule, this

the ruling of the courts of appeal of Illinois.

Appellate cites some of which he holds and some of which hold contrary

of serving as a juror. Appellant cites and quotes numerous cases of

and case of Illinois, such convicted person was thereby rendered incomp-

lives. Appellant contends that under Section 7, Division II of the

this juror was asked concerning such and such false answers to inter-

propounded to him or any juror on the voir dire. There is no contention

the verdict was returned. The record does not show any questions

as. This fact was not known to defendant's attorney until two days

been convicted of grand larceny and had not been restored to his legal

trial because it was discovered after the verdict. One of the jurors

Appellant contends that the trial court erred in not granting a

People v. Jones, 208 Ill. 32, 93.

People v. Jones, 208 Ill. 32, 93; People v. Jones, 208 Ill. 32, 93.

tion given for plaintiff, such defendant cannot complain of plaintiff's

tion asks the jury to be instructed in a like manner as in an in-

otions are to be received as a series. Where a defendant in the general

story instruction. The jury was very fully instructed in this case.

given advised the jury of the same duty. Instruction No. 1 was not a

ble error. Defendant in its instructions No. 12 and No. 14 is re-

abstract instruction is misleading, and that the giving of it is re-

the safety of persons passing over the same. The appellant claims that

to allow it at the place in question in a reasonably safe condition

that the law required the city to use reasonable care to keep the

Instruction No. 12 is an error on behalf of the plaintiff, advised the

200.00.

g was still causing him trouble. The board and doctor bills

tain, and at the time of the trial, three and a half years later,

the contrary. It would unduly lengthen this opinion to discuss such cases individually. We believe, under the law of Illinois, if a party fails to make an inquiry on the voir dire, he may not successfully request a reversal because of later acquired knowledge.

In Raub vs Carpenter, 47 L. Ed. 119, 187 U.S. 159, the statutes of the District of Columbia provide that for qualification of a juror he must never have been convicted of a felony or misdemeanor involving moral turpitude. This was a Civil case. One of the jurors had several times been convicted of larceny. Motion for a new trial had been denied. The court said that it was within the discretion of the trial court to grant or deny a new trial. At page 122, the court said that "No reason is perceived why this particular objection could not be waived by the parties, and even where a party might be entitled to claim that he had not waived it, that would go to the merits on application for new trial and not to the want of power." The same rule of discretion is held by the courts of Illinois. Mutual Life Insurance Company vs Allen, 113 Ill.App. 30, 38, affirmed in 212 Illinois Supreme Reports, 134, 141.

In Chase vs The People, 40 Ill. 352, 358, the court refused reversal of the judgment on the complaint that one of the jurors was an alien, and said, "It is the duty of the parties to ascertain, by proper examination, the competency of the jurors." In Swarnes, Admx. vs Sitton, 58 Ill. 155 two jurors had decided two former cases against the defendant. Defendant's attorney, who had been in those cases, had forgotten that such jurors had served and so decided. The court said that it was the duty of the attorney for the defendant to recollect such fact, and that the consequence of such forgetfulness should not be visited upon the plaintiff. In Eyars vs City of Mt. Vernon, 77 Ill. 467, 470, the Court said, "A party will not be permitted to accept a juror without any examination as to his competency, and afterwards set aside the verdict because the juror did not possess the requisite qualifications, this would be to trifle with the forms of the law."

In State vs Keziah, 110 L.A. 11, 34 So. 107, the foreman of the jury was under indictment. This juror was not asked if he was charged

contrary. It would actually strengthen this opinion to discuss each
see individually. We believe, under the law of Illinois, it is a
right to make an inquiry on the voir dire, but may not successfully
test a reversal because of later acquired knowledge.

In Rand vs. O'Connell, 17 L. Ed. 110, 107 U.S. 124, the

status of the juror is provided for in the constitution of a
juror he must have been convicted of a felony or misdemeanor involv-
ing moral turpitude. This was a civil case. One of the jurors had never
been convicted of a felony. Motion for a new trial was denied.
The court said that it was within the discretion of the trial court to
grant or deny a new trial. At that time, the court said that "the reason

is received by this appellate court is not as stated by the
trial, and even where a party might be entitled to a new trial, it is not
given it, that would go to the merits of the case. The court said that it had not
the want of power." The same rule of discretion is held by the courts
of Illinois. Actual Life Insurance Co. v. Illinois, 112 Ill. 2d 3, 98,

affirmed in 312 Ill. 2d 3, 98, 192, 193.

In Chase vs. The People, 41 Ill. 2d 322, 323, the court refused reversal

the judgment on the complaint that one of the jurors was ill, and
that "it is the duty of the parties to ascertain, by proper examination,
a competency of the jurors." In Swenson, Asky. vs. State, 55 Ill. 185
of jurors had decided the former case against the defendant. Defendant's
jurors, who had been in those cases, had forgotten that each juror had
tried and so decided. The court said that it was the duty of the attorney
for the defendant to recall each fact, and that the consequence of such
negligence should not be visited upon the plaintiff. In Byrne vs. City of
Chicago, 70 Ill. 427, 428, the Court said, "A party will not be permitted

to set a juror without any examination as to his competency, and afterwards
to raise the verdict because the juror did not possess the requisite quali-
fications, this would be to trifling with the force of the law."

In State vs. Kessler, 110 L.A. 11, 34 So. 107, the foreman of the

jury was under indictment. This juror was not asked if he was charged

with or had been convicted of a misdemeanor or felony. Neither the defendant nor his attorney knew of the indictment until the jury had returned a verdict of murder. That court said, "The rule is stringent that a defendant, if he has not interrogated as to qualification of jurors, cannot take advantage of knowledge learned after verdict."

In Kohl vs. Lehlback, 40 L. Ed. 432, 160 U.S. 293, the fact that a juror was an alien was not learned until after the verdict. This was due to the negligence of the defendant's attorney in not so learning. It was there claimed, as claimed here, that the Common Law right of trial by jury had been violated involving infraction of the Constitution. The court held to the contrary and refused to reverse the judgment. In the Kohl case, the court approved the case of Chase vs The People, 40 Ill. 352, ^{Supra}, and pointed out that it had overruled earlier Illinois decisions. The above requirements are recited in many cases which are quoted and cited in State vs Pickett, by the Supreme Court of Iowa, 73 N.W. 346, 347.

Since appellant has not shown by the record that it made any attempt upon examination of tendered jurors for examination, to learn the qualification of this juror, it cannot now complain because of such later acquired knowledge. To hold otherwise would be an inducement to litigants to refrain from determining qualifications of jurors until a party might first find how a jury had decided the issues.

Finding no error in this record, the judgment of the Circuit Court should be, and accordingly is hereby affirmed.

JUDGMENT AFFIRMED.

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his attorney knew of the indictment until the jury had returned a ver-
dict of murder. That court said, "The rule is stringent that a defendant,
he has not interpreted as the qualification of jurors, against the al-
lege of knowledge learned after verdict."

In Kubi vs. Lehigh, 40 A. 2d 821, 150 U.S. 220, the fact
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due to the reliance of the defendant's attorney is not as learning.
as there claimed, as stated here, that the Common Law right of trial
jury had been violated involving violation of the Constitution. The
it held to the contrary and refused to reverse the verdict. In the
case, the court reviewed the case of Chapman vs. People, 10 Ill.
409, and pointed out that it had overruled earlier Illinois decisions.
above reproduced are recited in many cases which are quoted and cited
State vs. Wright, by the Supreme Court of Iowa, 20 N.W. 286, 187.
since applicant has not shown by the record that it was any
examined upon examination of records of the court for examination, to learn
qualification of this juror, it cannot be considered in violation of such
acquired knowledge. To hold otherwise would be an invasion of
rights to fair trial in the selection of jurors until
it might first find that a juror had been disqualified.
Finding no error in this regard, the judgment of the circuit
it should be, and accordingly is hereby affirmed.

LONGMONT ATTORNEY.

12
5/10/45
Gen. No. 10045

2102
Agenda No. 7

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1945

PETER McGOVERN, ANNE BURR,
ELLEN FOX, KATE McGOVERN and
ELIZABETH MURPHY,
PLAINTIFFS-Appellants,

v.

JOSEPH W. McGOVERN, INDIVIDUALLY
AND AS EXECUTOR OF THE ESTATE OF
JAMES W. McGOVERN, DECEASED,
MARGARET MARIE McGOVERN AND REV.
FRANCIS GARRITY,
Defendants-Appellees.

328 I.A. 316²

APPEAL FROM
THE CIRCUIT COURT OF
WILL COUNTY.

Mr. Justice Dove delivered the opinion of the court:

James W. McGovern died on June 11, 1943, leaving an instrument dated June 4, 1943, purporting to be his last will and testament, which was admitted to probate by the probate court of Will County on September 11, 1943. By its terms it directed the executor to pay Rev. Francis Garrity \$100 for high masses, and the remainder of the estate, after payment of debts and funeral expenses, was devised and bequeathed to Margaret Marie McGovern, styling her as "my beloved niece."

On March 28, 1944, appellants filed a complaint in the circuit court of Will County to contest the will, on the ground of mental incapacity and undue influence, alleging themselves to be cousins and next of kin of the decedent, and on April 29, 1944,

IN THE PROBATE COURT OF THE
STATE OF ILLINOIS

SECOND DISTRICT
OCTOBER TERM, A.D. 1943

PETER MOGOVERN, ANNE BURR,
ELLEN FOX, NATE MOGOVERN and
ELIZABETH MURPHY,
Plaintiffs-Appellants,

v.

JACOB W. MOGOVERN, INDIVIDUALLY
AND AS EXECUTOR OF THE ESTATE OF
JAMES W. MOGOVERN, DECEASED,
MARIAHET MARIE MOGOVERN AND REV.
FRANCIS GARNITY,
Defendants-Appellees.

WILLIAM T. RAY,
Clerk of the Circuit Court of
Will County.

Mr. Justice Dove delivered the opinion of the court:

James W. Mogovern died on June 11, 1943, leaving an instrument dated June 4, 1943, purporting to be his last will and testament, which was admitted to probate by the probate court of Will County on September 11, 1943. By its terms it directed the executor to pay Rev. Francis Garnity \$100 for high masses, and the remainder of the estate, after payment of debts and funeral expenses, was devised and bequeathed to Mariahet Marie Mogovern, styling her as "my beloved niece."

On March 22, 1944, appellees filed a complaint in the circuit court of Will County to contest the will, on the ground of mental incapacity and undue influence, alleging themselves to be cousins and next of kin of the decedent, and on April 22, 1944,

appellees filed their separate motions to dismiss the complaint on the ground that the allegations fail to state facts sufficient to entitle the plaintiffs to relief, but are vague, uncertain, indefinite, and contain ~~mere~~^{mere} conclusions.

On May 6, 1944, the trial court entered the following order:

"The motions of the defendants to dismiss this cause are called up for hearing in pursuance of the previous order of this court but no one appears for the plaintiffs, and the court sits and hears said motions and being now fully satisfied in the premises it is ordered by the court that said motions be and are now allowed, and that this cause be and is now dismissed at plaintiffs' costs."

No notice of appeal from the order was filed within the statutory ninety days, and in apt time, a petition for leave to appeal was filed in the Supreme Court, but no freehold being involved, the cause was transferred to this court. (McGovern v. McGovern, 390 Ill. 516). The petition was granted by this court, and notice of appeal was filed on June 25, 1945.

It is insisted by appellees that the order of May 6, 1944 is not a final appealable order. It is well settled that an order which merely dismisses a complaint, or dismisses a complaint at the plaintiff's costs, is not a final appealable order, and that to be final, an order should adjudge that the plaintiff take nothing by the writ and that the defendant go hence without day, or words of equivalent meaning. (Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200; Board of Education v. Board of Education, 301 Ill. App. 228, 229 Prange v. City of Marion, 297 Ill. App. 353, 356, 357). A general definition of a final and appealable judgment or decree is found in McDonald v. Walsh, 367 Ill. 529, 533, where the court said: "A judgment or decree is final and reviewable when it terminates the litigation on the merits of the case and determines the rights of the parties. (Citing cases.) An order has the essential ^{elements} of finality when, if affirmed, the

appellants filed their separate motions to dismiss the complaint on the ground that the allegations fail to state facts sufficient to entitle the plaintiffs to relief, but are vague, uncertain, indefinite, and contain ~~no~~ conclusions.

On May 3, 1944, the trial court entered the following

order:

"The motions of the defendants to dismiss this case are called up for hearing in pursuance of the previous order of this court but no one appears for the plaintiffs, and the court sits and hears said motions and being now fully satisfied in the premises it is ordered by the court that said motions be and are now allowed, and that this case be and is now dismissed at plaintiffs' costs."

No notice of appeal from the order was filed within the statutory ninety days, and in any event, a petition for leave to appeal was filed in the Supreme Court, but no grounds being involved, the cause was transferred to this court. (McGovern v. McGovern, 330 Ill. 516). The petition was granted by this court, and notice of appeal was filed on June 25, 1944.

It is stated by appellants that the order of May 3, 1944 is not a final appealable order. It is well settled that an order which merely dismisses a complaint, or dismisses a complaint at the plaintiff's costs, is not a final appealable order, and that to be final, an order should allege that the plaintiff take nothing by the suit and that the defendant do hence without day, or words of equivalent meaning. (O'Leary v. Board of Education, 301 Ill. App. 238, 239; Board of Education v. Board of Education, 352, 353, 354). A general allegation of a final and appealable judgment or decree is found in *McGovern v. McGovern*, 330 Ill. 522, 523, where the court said: "A judgment or decree is final and reviewable when it terminates the litigation on the merits of the case and determines the rights of the parties. (Citing cases.) An order has the essential ^{element} of finality when, if affirmed, the

trial court has only to proceed with its execution." In discussing this general definition, the court said in the recent case of Brauer Machine and Supply Co. v. Parkhill Truck Co., 383 Ill. 569, 574; "While this general definition is well settled, and ordinarily applicable, as expressing the meaning of those words, nevertheless they are not always used in this restricted sense. The final decision from which an appeal lies does not necessarily mean such decision or decree, only, which finally determines all the issues presented by the pleadings. It may, with equal propriety, refer to the final determination of a collateral matter, distinct from the general subject of the litigation, but which, as between the parties to the particular issue, settles the rights of the parties. Such an order is final and appealable."

In Mutual Reserve Fund Life Ass'n. v. Smith, 169 Ill. 264, 265, it is said in the opinion: "A final judgment means, not a final determination of the rights of the parties with reference to the subject matter of the litigation, but merely of their rights with reference to the particular suit. It is ^{at all} not necessary that the judgment should be upon the merits, if it definitely puts the case out of court. It is the termination of the particular action which marks the finality of the judgment. A judgment of non-suit or dismissal is final." This case has been frequently cited with approval by the Supreme Court, down to and including Brauer Machine and Supply Co. v. Parkhill Truck Co., 383 Ill. 569.

The order in the case at bar did not merely dismiss the complaint, but dismissed the cause at the cost of the plaintiffs. It terminated the rights of the parties in the particular suit, and definitely put the case out of court, as effectively and with the same result as if the order had specifically adjudged that the plaintiffs take nothing by the writ and that the defendants go hence without day. Being of the same force and effect as such

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The order in the case at bar did not merely dismiss the complaint, but dismissed the cause at the cost of the plaintiffs. It terminated the rights of the parties in the particular suit, and definitely put the case out of court, as effectively and with the same result as if the order had absolutely adjudged that the plaintiffs take nothing by the writ and that the defendants go hence without day. Being of the same force and effect as such

an order it is manifestly equivalent thereto. There was nothing further to be done, and if the order be affirmed, the court would have only to proceed with its execution in enforcing the payment of the costs. The order is a final and appealable order.

The remaining questions are whether the allegations of the complaint sufficiently charge mental incapacity of the testator, and undue influence. The allegations as to mental incapacity are as follows:

"That the said James W. McGovern, at the time of the signing of said instrument in writing, purporting to be his Last Will and Testament, was not of sound mind and memory, but on the contrary was in his dotage, was suffering from uremia and other diseases, and his mind and memory were so impaired as to render him wholly incapable of making any just and proper distribution of his estate."

The law assumes that all adults are of sound mind until the contrary is proven. (*Grosh v. Acom*, 325 Ill. 474, 491). Mere eccentricity does not constitute unsoundness of mind. Age, sickness or debility of the body does not affect capacity to make a will if the testator has sufficient intelligence remaining to make a will. (*Hoskinson v. Lovelette*, 365 Ill. 21, 27). The fact that certain relatives are excluded without any reason therefor, or because of prejudice, does not indicate want of mental capacity, if such does not amount to an insane delusion. (*Quathamer v. Schoon*, 370 Ill. 606, 608). But the law requires a testator to know what he is doing, what property he has, who are the natural objects of his bounty, what disposition he wants to make of his property, and to be capable of understanding the nature and effect of executing his will. (*Hoskinson v. Lovelette*, 365 Ill. 21; *Anlicker v. Brethorst*, 329 Ill. 11, 20).

In the *Anlicker* case the trial court refused an instruction offered by the contestants on the question of mental incapacity by reason of insane delusions. The proponents contended that the action of the court was justified on the ground that the bill filed contained no allegation to that effect. Overruling the contention,

an order it is manifestly evident that the same was not intended to be done, and if the order be affirmed, the court would have only to proceed with the execution in enforcing the payment of the costs. The order is a final and appealable order.

The remaining questions are whether the allegations of the complaint sufficiently charge mental incapacity of the testator, and undue influence. The allegations as to mental incapacity are as follows:

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The law assumes that all adults are of sound mind until the contrary is proven. (Good v. Acorn, 313 Ill. 47, 1917.)

Insanity does not constitute unconsciousness of mind. Age, sickness or debility of the body does not affect capacity to make a will if the testator has sufficient intellectual faculties to make a will. (Hoskinson v. Lovellette, 303 Ill. 1, 27.) The fact that certain

relatives are excluded without any reason therefor, or because of prejudice, does not indicate want of mental capacity, if such does not amount to an insane delusion. (Quatman v. Johnson, 293 Ill.

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In the Anlicker case the trial court refused an instruction offered by the contestants on the question of mental incapacity by reason of insane delusions. The proponents contended that the

action of the court was justified on the ground that the bill failed to contain no allegation to that effect. Overruling the objection,

The Supreme Court said in the opinion: "It was not necessary for the bill to name specifically the particular kind of unsoundness of mind nor the cause of mental unsoundness. These are matters of evidence and need not be alleged." (Citing American Bible Society v. Price, 115 Ill. 623; Snell v. Weldon, 243 Ill. 496).

In the American Bible Society case, the court, in passing upon the sufficiency of the allegations to contest a will, said at page 635 of the opinion: "The bill, it has been seen, charges that the testator had become, and was at the time of the making of the will, of unsound mind and memory, thus, in effect, simply putting in issue his testamentary capacity, which, by our statute, is defined to be that of being of a prescribed age, and of sound mind and memory.' The only material question, manifestly, under this allegation, was whether the writing produced was the product of an unsound mind and memory. The specific name applied to describe that unsoundness, the means whereby the unsoundness was caused, or how it came about that the unsound mind and memory caused this writing to be drawn and signed, were matters of evidence that need not be alleged, and, if alleged, need not be proved." This holding is quoted with approval in Snell v. Weldon, 243 Ill. 496, 530, and the court held in that case that where the bill charged that the testator was of unsound mind and memory, a further allegation that he had an insane delusion in regard to his son, was merely an amplification of the main charge, or a pleading of evidentiary facts.

In Dietzel v. Pozen, 278 Ill. App. 89, relied upon by appellee, the allegations of the bill as to mental incapacity were that at the time of the execution of the instrument testator was not of sound mind and memory but on the contrary was at the point

The Supreme Court said in the opinion: "It was not necessary for the bill to name specifically the particular kind of unconsciousness of mind nor the cause of mental impairment. These are matters of evidence and need not be alleged." (Citing American Bible Society v. Price, 115 Ill. 23; Shell v. Nelson, 243 Ill. 408).

In the American Bible Society case, the court, in passing upon the sufficiency of the allegations to contest a will, said at page 630 of the opinion: "The bill, it has been seen, charges that the testator had become, and was at the time of the making of the will, of unsound mind and memory, thus, in effect, simply putting in issue his testamentary capacity, which by our statute, is defined to be that of being of a prescribed age, and of sound mind and memory." The only material question, manifestly, under this allegation, was whether the writing produced was the product of an unsound mind and memory. The word "unsound" was applied to describe what unconsciousness was caused, or how it came about, and the sound mind and memory caused this writing to be drawn and signed, were matters of evidence that need not be alleged, and, it might be added, need not be proved." This holding is quoted with approval in Shell v. Nelson, 243 Ill. 408, 630, and the court held in that case that where the bill charged that the testator was of unsound mind and memory, a further allegation that he had an insane delusion in regard to his son, was merely an allegation of the main charge, or a pleading of evidentiary facts.

In Dietzel v. Rosen, 273 Ill. App. 82, relied upon by appellants, the allegations of the bill as to mental incapacity were that at the time of the execution of the instrument testator was not of sound mind and memory but on the contrary was at the point

of death by reason of some malignant disease, the exact nature of which was unknown to the complainant and his mind and memory were so impaired as to render him wholly incapable of making any just and proper distribution of his estate. The allegations were similar to those in the instant complaint except that in the Dietzel case it was alleged that the testator was at the point of death by reason of some malignant disease, the exact nature of which was unknown to the pleader, and there was no allegation that the testator was in his dotage. The court in its opinion quoted the first part of the holding in the American Bible Society case, *supra*, but omitted the last sentence and held that there was no sufficient allegation in the bill that the purported will was the product of an unsound mind and memory. We are unable to agree with that holding. The allegation as to mental incapacity, in the instant case, specifically charges that James W. McGovern, "at the time of the signing of said instrument was not of sound mind and memory, but on the contrary his mind and memory were so impaired as to render him wholly incapable of making any just and proper distribution of his estate." This relates specifically to distribution of his estate by the purported will, and in our opinion is a charge of mental incapacity to make a will.

Beginning in 1874, with Puterbaugh's Pleading and Practice, Chancery, substantially the same form of allegation of mental incapacity has appeared in that and similar works by Branson, Wermuth, and Edmunds, and have been considered by the bar as authoritative, and generally used.

In the work on Pleading and Practice under the Illinois Civil Practice Act, by Palmer D. Edmunds, former Commissioner of our Supreme Court, Vol. 3, (1940 Cum. Pocket Supp. page 23), the American Bible Society case, *supra*, and the Andlicker case, *supra*, are quoted, and in discussing the Dietzel case, it is said: "The Dietzel case appears to be an unwarranted departure from the ruling laid down

of death by reason of some malignant disease, the exact nature of which was unknown to the complainant and his mind and memory were so impaired as to render him wholly incapable of making any just and proper distribution of his estate. The allegations were similar to those in the instant complaint except that in the Dietzel case it was alleged that the testator was at the point of death by reason of some malignant disease, the exact nature of which was unknown to the defendant, and there was no allegation that the testator was in his dotage. The court in its opinion quoted the first part of the holding in the American Bible Society case, supra, but omitted the last sentence and held that there was no sufficient allegation in the bill that the purported will was the product of an unimpaired mind and memory. We are unable to agree with that holding. The allegation as to mental incapacity, in the instant case, specifically charges that James W. McGowan, "at the time of the signing of said instrument . . . was not of sound mind and memory, but on the contrary . . . his mind and memory were so impaired as to render him wholly incapable of making any just and proper distribution of his estate." This relates specifically to distribution of his estate by the purported will, and in our opinion is a charge of mental incapacity to make a will.

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by the Supreme Court."

We are of the opinion and hold that the allegations as to mental incapacity are sufficient.

The allegations as to undue influence are as follows:

"6. That the defendant Joseph W. McGovern, Executor herein, is the husband of Margaret Marie McGovern, the principal legatee and devisee herein; and that the defendant Rev. Francis Garrity is the son of Anthony J. Garrity, who is one of the two attesting witnesses of said will, and also the person who drew said will and attended to its execution.

"7. That the defendant Margaret Marie McGovern, the principal legatee and devisee herein, managed the property of the said James W. McGovern, deceased; and that there was a fiduciary relation and confidential relationship existing between the said Margaret Marie McGovern and James W. McGovern, deceased."

"8. That the defendants Joseph W. McGovern and Margaret Marie McGovern used and exercised many undue acts and fraudulent practices and resorted to falsehood and misrepresentation and the improper withholding of true facts to induce the said James W. McGovern to execute said instrument of writing, and the said James W. McGovern, deceased, in executing the same, was in fact under improper restraint and undue influence from the said acts and practices of the said defendants Joseph W. McGovern and Margaret Marie McGovern."

The second paragraph of the complaint alleges that the decedent left as his heirs at law and next of kin, Peter McGovern, his first cousin; Anne Burr, his first cousin; Ellen Fox, his first cousin; Kate McGovern, his first cousin; and Mary McGrath, "now deceased," his first cousin, and the ninth paragraph alleges that the latter left the plaintiffs as her sole heirs at law. The purported will names Margaret Marie McGovern as "my beloved niece."

If that be true, she would be his next of kin, to the exclusion of the plaintiffs, but the allegations of the complaint, admitted to be true by the motion to strike, exclude her as his next of kin.

In *Pollock v. Pollock*, 328 Ill. 179, 186, relied upon by appellees, the rule as to what constitutes undue influence is stated as follows: "Undue influence which will invalidate a will must be of such a character as to deprive the testator of free agency. It must be such as to destroy the freedom of the testator's purpose and render the instrument more the will of another than his own. Such influence must be directly connected with the execution of the instrument and operate at the time it is made, producing a perversion of the testator's mind, and it must be a species of fraud. Advice or persuasion will not vitiate a will freely and understandingly made. The influence resulting from love and affection, which does not seek to control the will of the testator, is not undue influence."

In *Ryan v. Deneen*, 375 Ill. 452, also relied upon by appellees, the will of Katherine Ryan left her property to her brother, Matthew D. Ryan, with a provision that if he predeceased her, one half was to go to Mary D. Deneen, a niece, absolutely, and the other half in trust for the benefit of her brother, Matthew R. Gregory, with a provision for remainder over to Mary D. Deneen, in case he died before the testatrix. Both Matthew D. Ryan and Matthew R. Gregory predeceased the testatrix and Mary D. Deneen took the whole estate under the will. The allegation as to undue influence on the part of Mary D. Deneen were similar to those of paragraph 8 of the complaint in the case at bar, except that the word "arts" was used in place of the word "acts." As to undue influence on the part of Matthew D. Ryan, it was alleged that he threatened the decedent by telling her that unless she made a will leaving everything to him, with remainder over as above mentioned, he would leave nothing to her; that she was of meek and humble character and controlled by Matthew D. Ryan, who was overbearing and dictatorial; that she acted only at the direction of Matthew D. Ryan, and that when the purported will was executed she was under the control of

...the control of
that she acted only at the direction of Matthew D. Ryan, and in a
troubled by Matthew D. Ryan, who was overbearing and dictatorial;
nothing to her; that she was of weak and feeble character and con-
fident by telling her that unless she made a will leaving every-
thing to him, she would lose everything she had; that she was
part of Matthew D. Ryan, it was alleged that he first told the
was made in face of the word "acts." As to undue influence on the
of the complaint in the case it does not exist that the word "acts"
on the part of Mary D. Ryan were similar to those of paragraph 2
which states under the will. The allegation as to undue influence
R. Gregory presented the testimony and Mary D. Ryan took the
case he did before the jury. Both Matthew D. Ryan and Matthew R.
Gregory, with a provision for his wife's support, Matthew R.
the other half in trust for the benefit of his wife, Matthew R.
him, one half was to go to Mary D. Ryan, a niece, absolutely, and
brother, Matthew D. Ryan, with a provision that if he predeceased
appellate, the will of Matthew Ryan left her property to her
In Ryan v. Ryan, 200 Ill. 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

Matthew D. Ryan.

In affirming the striking of those allegations the court said in the opinion: "It is not sufficient to aver undue influence as a conclusion, but facts must be stated warranting the conclusion and must go to the extent of showing the testator was thereby deprived of his free agency. (Ater v. McClure, 329 Ill. 519; Heavner v. Heavner, 342 Ill. 321). The allegation that the testatrix was under the control of Mary D. Deneen and Matthew D. Ryan and that the will was not that of the testatrix were mere conclusions of the pleader. (Heavner v. Heavner, supra). Furthermore, undue influence is that coercion which destroys the freedom of the testator and renders the instrument obviously more the offspring of the will of another, or other than his own." It was further held that the alleged threat was a mere statement that a reciprocal act would be withheld if the testatrix did not dispose of her property in the manner suggested, and imported an offer of a reciprocal devise if she made such a will, and amounted to no more than persuasion.

In the Heavner case, also relied upon by appellees, the court affirmed the sustaining of a demurrer to allegations relied upon to show undue influence. The allegations were that "Frank Heavner was ^{the} ~~a~~ brother of Bluford (the testator) and that Bluford relied upon Frank's judgment; that at the time of the supposed making of the instrument purporting to be his last will, Bluford was a man weak in mind and body, and Frank was a strong man of a dominating personality; that Bluford was under the control of Frank at the time he executed the instrument, and it was not the result of the free will and judgment of Bluford but was the result of the undue influence of Frank; that Bluford in executing the instrument was in fear of and under the intimidation of Frank, which caused it to be so made, if at all, and it would not have been so made, or made at all, but for the same."

The contrast in the Ryan case from the case at bar is

Matthew D. Ryan.

In affirming the striking of those allegations the court said in the opinion: "It is not sufficient to aver undue influence as a conclusion, but facts must be stated warranting the conclusion and must go to the extent of showing the testator was thereby deprived of his free agency. (Ayer v. McGuire, 239 Ill. 319; Heaven v. Heaven, 348 Ill. 321). The allegation that the testatrix was under the control of Mary D. Donohue and Matthew D. Ryan and that the will was not that of the testatrix were mere conclusions of the pleader. (Heaven v. Heaven, supra). Furthermore, undue influence is that coercion which destroys the freedom of the testator and renders the instrument obviously more the offspring of the will of another, or other than his own. It was further said that the alleged threat was a mere statement that a reciprocal act would be withheld if the testatrix did not dispose of her property in the manner suggested, and imported an offer of a reciprocal device if she made such a will, and amounted to no more than persuasion.

In the Heaven case, also relied upon by appellates, the court affirmed the sustaining of a demurrer to allegations relied upon to show undue influence. The allegations were that "Frank Heaven was a ^{the} brother of Bluford (the testator), and that Bluford relied upon Frank's judgment; that at the time of the supposed making of the instrument purported to be his last will, Bluford was a man weak in mind and body, and Frank was a strong man of a dominating personality; that Bluford was under the control of Frank at the time he executed the instrument, and it was not the result of the free will and judgment of Bluford but was the result of the undue influence of Frank; that Bluford in executing the instrument was in fear of and under the intimidation of Frank, which caused it to be so made, if at all, and it would not have been so made, or made at all, but for the same."

The contrast in the Ryan case from the case at bar is

apparent. In that case there was no allegation as to an enfeebled condition of the testatrix's mind, while in the case at bar it is alleged that James W. McGovern was in his dotage, suffering from uremia and other diseases, and his mind and memory were so impaired as to render him wholly incapable of making any just and proper distribution of his estate; that Joseph W. McGovern, the executor, is the husband of Margaret Marie McGovern, the principal beneficiary; that the will was drawn and its execution attended to by the father of the other legatee; that Margaret Marie McGovern managed the property of the decedent and that a fiduciary relation existed between them.

The difference between the Heavner case and the case at bar is also obvious. In the opinion in that case it is said that no act or word of Frank Heavner was alleged tending to show that he took any part in procuring the execution of the will, or that his dominant personality had anything to do with it. The opposite is true here. In *Sulzberger v. Sulzberger*, 372 Ill. 240, 245, the court said in the opinion: "The rule stated in *England v. Fawbush*, 204 Ill. 384, 392, and since quoted and followed in numerous cases, is; "Where a will is written, or procured to be written, by a person largely benefited by it, such circumstances excites stricter scrutiny and requires stricter proof of volition and capacity. The proof, required in such cases, must be such as to fully satisfy the court or jury that the testator was not imposed upon, but knew what he was doing, and what disposition he was making of his property when he made his will. The active agency of the beneficiary of a will in procuring it to be drawn, especially in the absence of those who have at least equal claims upon the justice of the testator, and where the testator is enfeebled by old age and disease, is a circumstance which indicates the probable exercise of undue influence. Where the mind is wearied and debilitated by long-continued and serious and painful sickness, it is susceptible to

apparent. In that case there was no allegation as to an unexplained condition of the testatrix's mind, while in the case at bar it is alleged that James V. McGovern was in his dotage, suffering from dementia and other diseases, and his mind and memory were so impaired as to render him wholly incapable of making any just and proper disposition of his estate; that John W. McGovern, the executor, is the husband of Margaret McGovern, the principal beneficiary; that the will was drawn and the execution attested to by the father of the other legatee; that Margaret McGovern had then received the property of the decedent and that a fiduciary relation existed between them.

The difference between the McGovern case and the case at bar is also obvious. In the McGovern case it is said that no act or word of James McGovern was alleged tending to show that he took any part in procuring the execution of the will, or that his dominant personality was anything to be feared. The McGovern case is true here. In *Quinlan v. Quinlan*, 320 Ill. 2d, 248, the court said in the opinion: "The rule stated in *Wright v. Wright*, 304 Ill. 384, 309, and since followed and followed in numerous cases, is: 'Where a will is written, or procured to be written, by a person largely benefited by it, such circumstances create a rebuttable presumption and require a stronger proof of volition and capacity. The proof, required in such cases, must be such as to fully satisfy the court on jury that the testator was not imposed upon, but knew what he was doing, and that disposition he was making of his property when he made his will. The active agency of the beneficiary of a will in procuring it to be drawn, especially in the absence of those who have a vested legal interest in the estate of the testator, and where the testator is evidenced to be in his dotage, is a circumstance which indicates the probable exercise of undue influence. Where the mind is weakened or debilitated by long-continued illness and senile and painful diseases, it is susceptible to

undue influence and is liable to be imposed upon by fraud and misrepresentation, 'the feebleness of the mind of the testator, no matter from what cause, - whether from sickness or otherwise, - the less evidence will be required to invalidate the will of such person.' "

In *McKaig v. Appleton*, 289 Ill. 301, it was alleged that because of the physical and mental condition of the testator, one of the legatees, charged with undue influence, had been his nurse for more than two years before the will was executed; that she was of a dominating character and the testator was a person of weak and feeble will, yielding to importunity; that the nurse had intimate knowledge of the testator's business, property and affairs and acted as his agent in collecting moneys due him; that she and others acting in concert with her procured the execution of the will by importunity, and that she threatened to desert and leave the testator if he refused to execute the will. These allegations were held sufficient to charge undue influence. The court said in the opinion: "That, in substance and effect, is a charge that the execution of the will was procured by the undue influence of one of the principal beneficiaries," and indicated that the pleading of other and evidentiary facts was not necessary.

Section 42, sub-section 2 of the Civil Practice Act, (Ill. Rev. Stat. 1945, chap. 110, par. 166), provides that no pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet. The presumption against the pleader does not require that the words of the pleading should be wrested to disregard the obvious meaning of the language used. (*Toledo, Peoria & Western Railroad Co. v. Brown*, 375 Ill. 438, 450; *Peabody v. Forest Preserve District*, 320 Ill. 454). Section 4 of the Civil Practice Act provides that it shall be liberally construed,

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misrepresentation, the feeble the mind of the testator, no
matter from what cause, - whether from sickness or otherwise, -
the less evidence will be required to invalidate the will of such
person."

In McKim v. Wilson, 200 Ill. 501, it was alleged that
because of the physical and mental condition of the testator, one
of the legatee, charged with undue influence, had been his nurse
for more than two years before the will was executed; that she was
of a dominating character and the testator was a person of weak and
feeble will, yielding to importunity; that the nurse had intimate
knowledge of the testator's business, property and affairs and acted
as his agent in collecting moneys due him; that she and others acting
in concert with her procured the execution of the will by importunity,
and that she threatened to desert and leave the testator if he re-
fused to execute the will. These allegations were held sufficient
to charge undue influence. The court said in its opinion: "That,
in substance and effect, is a charge that the execution of the will
was procured by the undue influence of one of the principal bene-
ficiaries," and indicated that the pleading of other and evidentiary
facts was not necessary.

Section 43, sub-section 1 of the Civil Practice Act, (Ill.
Rev. Stat. 1945, Chap. 110, par. 102), provides that no pleading shall
be deemed valid in substance which shall contain such information as
shall reasonably inform the opposite party of the nature of the claim
or defense which he is called upon to meet. The presumption against
the pleader does not require that the words of the pleading should
be written to disregard the obvious meaning of the language used.
(Tolsted, Pomeroy & Newman, Willing Co. v. Jones, 77 Ill. App. 430;
People v. Forest Preserve District, 303 Ill. 454). Section 4 of
the Civil Practice Act provides that it shall be liberally construed,

to the end that controversies may be speedily and finally determined according to the substantive rights of the parties.

The motions to strike were directed to the entire complaint and while the allegations of the eighth paragraph thereof are almost entirely conclusions of the pleader, we believe the remaining allegations are sufficient to require the defendants to answer the charges therein made. The judgment order of the circuit court is therefore reversed and this cause is remanded with directions to overrule the motions to dismiss.

Reversed and remanded with directions.

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motions to dismiss.

Reversed and remanded with directions.

at 1/20/33

Abstract

Gen. No. 10053

Agenda No. 11

A

IN THE
APPELLATE COURT
of the
STATE OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1945.

Board of Education in and For
The School District Of The City
of Rockford, Illinois, Other-
wise Known As School District
No. 205 Of Winnebago County,
Illinois,

Plaintiff-Appellee

v.

Board Of Education Of Non-High
School District No. 206 Of
Winnebago County, Illinois

Defendant-Appellant

2113

328 I.A. 317

Appeal from the
Circuit Court of
Winnebago County.

Dove, J. delivered the opinion of the court.

Plaintiff brought suit to recover a balance of \$4329.07 claimed to be due it for tuition of pupils who attended its school from defendant non-high school district for the school year ending June 30, 1941. The trial court sustained a motion to strike the complaint as amended and the plaintiff having elected to stand upon its complaint as amended, an appropriate judgment was entered dismissing the suit. From that judgment an appeal was prosecuted to this court resulting in the judgment of the trial court being reversed and the cause remanded with directions to overrule defendant's motion to strike and to proceed in accordance with the views announced in the opinion

Handwritten signature

Handwritten letter 'A'

Gen. No. 10055

IN THE
APPELLATE COURT
of the
STATE OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1945.

3281A 813

Appeal from the
Circuit Court of
Winnebago County.

Board of Education in and for
The School District of the City
of Rockford, Illinois, Other-
wise Known As School District
No. 208 of Winnebago County,
Illinois,

Plaintiff-Appellant

v.

Board of Education of Non-High
School District No. 208 of
Winnebago County, Illinois

Defendant-Appellee

Dove, J. delivered the opinion of the court.

Plaintiff brought suit to recover a balance of \$4312.07

claimed to be due it for tuition of pupils who attended the
school from defendant non-high school district for the school
year ending June 30, 1941. The trial court sustained a motion

to strike the complaint as amended and the plaintiff having
elected to stand upon its complaint as amended, an appropriate
judgment was entered dismissing the suit. From that judgment

an appeal was presented to this court resulting in the judgment
of the trial court being reversed and the cause remanded with
directions to overrule defendant's motion to strike and to
proceed in accordance with the view announced in the opinion

of this court. (Board of Education v. Board of Education, 321 Ill. App. 131.)

Upon the cause being redocketed in the Circuit Court of Winnebago County pursuant to the mandate of this court, that court overruled the motion of defendant to strike and an answer was filed. Thereafter a further amendment to the complaint as amended was filed which set forth par. 104 of chap. 122 as amended by an act approved July 23, 1943 Ill. Rev. St. 1943. A reply was filed and a trial had resulting in a judgment in favor of the plaintiff and against the defendant for \$4,329.07 and the defendant appeals.

In our former opinion we stated that the sum sued for represented depreciation charged on school buildings and equipment allocable to that part of the cost thereof paid by the Federal Government under a P.W.A. grant and we held that such was a cost item and properly included in computing tuition. Our decision upon this appeal must necessarily be the same as it was on the former appeal. The rule of law is, that when litigation is prosecuted to an appellate tribunal and questions of law are decided, all such questions relating to the same subject matter which were open to consideration and could have been presented are res adjudicata, whether they were presented or not. This is true whether the judgment was reversed and the cause remanded or the judgment affirmed. City of Chicago v. Collin, 316 Ill. 104.

The circuit court could not err in adopting the opinion of this court on the former appeal as a guide to a correct conclusion in the further proceedings in the case and no attention will be given to arguments that the court erred in so doing. Manternach v. Studt, 240 Ill. 464.

Counsel for appellant, however, states in his brief that the instant judgment was rendered by the trial court pursuant to the opinion of this court on the previous appeal. The law

of this court. (Board of Education v. Board of Education, 308 U.S. 161.)

III. App. 121.

Upon the issues being resolved in the District Court of

Winnebago County pursuant to the mandate of this court, that

court overruled the motion of defendant to strike and an answer

was filed. Thereafter a further amendment to the complaint was

amended was filed which set forth par. 1st of comp. 1st as

amended by an act approved July 23, 1945 Ill. Rev. Stat. 1945.

A reply was filed and a trial had resulting in a judgment in favor

of the plaintiff and against the defendant for \$4,000.00 and the

defendant appealed.

In our former opinion we stated that the same was for app-

reversed disposition excepted on appeal, including the judgment

affordable to that part of the cost thereof paid by the defendant.

Government under a 2.1.1. Grant and we held that there was a cost

item and properly included in computing taxation. Our decision upon

this appeal must necessarily be the same as it was on the former

appeal. The rule of law is, that when taxation is presented

to an appellate tribunal and question of law is involved, all

such questions relating to the same subject matter which were

open to consideration and could have been presented are now

adjudicated, whether they were presented or not. This is true

whether the judgment was reversed and the case remanded or the

judgment affirmed. City of Chicago v. Collins, 308 Ill. 194.

The appellate court could not try in stating the question of

this court on the former appeal as a guide to a correct con-

clusion in the further proceedings in the case and no statement

will be given to arguments that the court erred in no way.

Kantner v. Smith, 308 Ill. 194.

Counsel for appellant, however, states in his brief that

the instant judgment was reversed by the trial court pursuant

to the opinion of this court on the previous appeal. The fact

announced by this court upon the former appeal is the law of this case and binding upon this court as well as the trial court until reversed by the Supreme Court. There is no error in this record and the judgment is affirmed.

Judgment affirmed.

announced by this court upon the former appeal is the law
of this case and binding upon this court as well as the trial
court until reversed by the Supreme Court. There is no error
in this record and the judgment is affirmed.

Judgment affirmed.

43552

HIGHWAY MUTUAL CASUALTY COMPANY, a
Corporation,

Appellee,

v.

LIBERTY DISPLAY FIREWORKS COMPANY and
LIBERTY CHEMICAL LABORATORIES, INC.,
a Corporation,

Appellants.

178
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

328 I.A. 318'

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On trial by the court there was a finding for plaintiff on his complaint and against defendant on his cross-complaint, with judgment for plaintiff in the sum of \$1236.46. Defendants appeal.

Plaintiff is an Illinois corporation, licensed to write insurance contracts. Defendants are engaged in business extra hazardous. December 31, 1938, plaintiff delivered to defendants an insurance policy by which it promised to indemnify them from loss under the Illinois Workmen's Compensation Act. A copy of the policy is attached to the complaint. It provides for a premium of \$8.75 for each \$100.00 of defendants' payroll. A rider endorsed on the policy is as follows:

"It is hereby understood and agreed that adjustment of premium under the Policy to which this endorsement is attached will be made at the termination of the Policy on the basis of a 50% loss ratio to the Company, (loss ratio to be figured on paid and outstanding claims) but in no event is the premium so developed to be higher or lower than the payroll audit developed at the following rates:

"Low Rate: \$8.75

"High Rate: \$20.00

"This endorsement applies to Code No. 4761 under the Classifications of Operations of this Policy."

HILARY MUTUAL CANNALY COMPANY, a
Corporation,
Appellee,

v.

LIBERTY DISPLAY FIREWORKS COMPANY and
LIBERTY CHEMICAL LABORATORIES, INC.,
a Corporation,
Appellants.

APPEAL FROM
COURT OF APPEALS,
COOK COUNTY.

3281-A-318

MR. PRESIDING JUSTICE WATSON DELIVERED THE OPINION OF THE COURT.

On trial by the court there was a finding for plaintiff on his complaint and against defendant on his cross-complaint, with judgment for plaintiff in the sum of \$100.00. Defendant appeals.

Plaintiff is an Illinois corporation, licensed to write insurance contracts. Defendants are engaged in business extra hazardous. December 31, 1933, plaintiff delivered to defendants an insurance policy by which it promised to indemnify them from loss under the Illinois Workmen's Compensation Act. A copy of the policy is attached to the complaint. It provides for a premium of \$2.75 for each \$100.00 of defendants' payroll. A rider endorsed on the policy is as follows:

"It is hereby understood and agreed that adjustment of premium under the Policy to which this endorsement is attached will be made at the termination of the Policy on the basis of a loss ratio to the Company. (Loss ratio to be figured on paid and outstanding claims) but in no event is the premium to be developed to be higher or lower than the payroll audit developed at the following rates:

"Low Rate: \$2.75

"High Rate: \$30.00

"This endorsement applies to Code No. 4761 under the Classification of this Policy."

2.

Plaintiff on October 4, 1939, gave defendants notice of the cancellation of the contract of insurance, effective October 14, 1939. After the cancellation plaintiff made an audit of defendants' books and an audit computation disclosing \$1236.46 due to plaintiff. The "Audit Adjustment" is attached to the complaint as Exhibit D. The audit bears the inscription: "Agent: Imperial Insurance Agency. Broker: Engelhardt-Krogman & Company".

The alleged defense interposed by defendants is based on the theory that the high rate of \$20.00 was not retroactive; that in the event the loss ratio became sufficiently high to call the high rate into use instead of the low rate, the computation of the amount due would not be made from the beginning of the contract but from the date of the last accident, which caused the higher rate to be brought into use. Defendants contended the written contract is ambiguous. They further say that plaintiff is bound by a construction of the contract contained in a letter dated January 19, 1939, addressed to Engelhardt-Krogman & Company, 175 West Jackson Blvd., Chicago, Illinois, Attention: O. W. Engelhardt. The letter says:

"Dear Sir:

Re: Liberty Fireworks
Highway Mutual Policy #A-3082

As per your request, we wish to confirm with this letter the fact that the rates on the above captioned compensation policy are not retroactive in the event that the loss ration becomes sufficiently high to call the higher rate of \$20.00 into use instead of the ordinary rate of \$8.75, except that they are retroactive to the date of the last accident which would cause the higher rate to be called into use. In other words, if this company were to go along for four or five months with a loss ration under 50% and suddenly have an accident which would bring it over 50%, the higher rate of \$20.00 would then be applied from the date of the accident which so increases the loss ration that the higher rate had to be charged.

We trust that this is the information desired. Thanking you for your past courtesies, we are

Plaintiff on October 4, 1932, gave defendant notice of the cancellation of the contract of insurance, effective October 14, 1932. After the cancellation plaintiff made an audit of defendant's books and an audit computation disclosing \$1238.48 due to plaintiff. The "Audit Adjustment" is attached to the complaint as Exhibit D. The audit bears the inscription: "Agent: Imperial Insurance Agency, Broker; Engelhardt-Program & Company".

The alleged defense interposed by defendant is based on the theory that the high rate of \$20.00 was not retrospective; that in the event the loss ratio became sufficiently high to call the high rate into use instead of the low rate, the computation of the amount due would not be made from the beginning of the contract but from the date of the last accident, which caused the higher rate to be brought into use. Defendant contended the written contract is ambiguous. They further say that plaintiff is bound by a construction of the contract contained in a letter dated January 19, 1932, addressed to Engelhardt-Program & Company, 175 West Jackson Bldg., Chicago, Illinois. Attention: O. W. Engelhardt. The letter says:

"Dear Sir:

Re: Liberty Fireworks
High ay Mutual Policy AA-3082

As per your request, we wish to confirm with this letter the fact that the rates on the above captioned compensation policy are not retrospective in the event that the loss ratio becomes sufficiently high to call the higher rate of \$20.00 into use instead of the ordinary rate of \$8.75, except that they are retrospective to the date of the last accident which would cause the higher rate to be called into use. In other words, if this company were to go along for four or five months with a loss ratio under 80% and suddenly have an accident which would bring it over 80%, the higher rate of \$20.00 would then be applied from the date of the accident which so increases the loss ratio that the higher rate had to be changed.

We trust that this is the information desired. Thanking you for your past courtesies, we are

3.

Very truly yours,

Imperial Insurance Agency, Inc.

By: H. W. Dorf."

The Imperial Insurance Agency was, as a matter of fact, Ralph Brusslan. He testified and described himself as a broker and soliciting agent. He had been doing business with plaintiff for some years. Mr. Korman, vice-president of plaintiff, testified, "They secured orders for policies that we saw fit to write or reject. They did nothing else for us. They collected moneys for premiums but did nothing else for us until such time that he would submit a prospective insured when we would either write the policy or reject it. * * * He was known more or less as a roving broker."

The evidence discloses Brusslan was paid a commission of 17 1/2% on this policy. He directed the plaintiff to send a part of his commission to Engelhardt-Krogman & Company. It appears the commission was split between them. Brusslan testified, "I was a soliciting agent for the Highway Mutual and several fire insurance companies. * * * I always dealt with Mr. Stone." Stone was the president of the plaintiff company, and Brusslan negotiated the insurance contract with him. At the time this letter was written Brusslan had an office, and a man named Dorf was in it. Brusslan says of him, "He was never employed by me, but he was in my offices when I moved from 166 W. Jackson Blvd. He was in the office at 330 S. Wells Street but that was not my office. My name was on the door but I did not run the office. He did work for me but I did not pay him for such work. He is an insurance broker on his own and he has his own business. He also assisted me in some of my business. My office is supposed to keep records of correspondence which goes out by the retention of copies. I have no records of the Imperial Insurance Agency. They have been thrown away."

Very truly yours,
Imperial Insurance Agency, Inc.
By: H. W. Dorr.

The Imperial Insurance Agency was, as a matter of fact, Ralph Brunsian, he testified and described himself as a broker and soliciting agent. He had been doing business with plaintiff for some years. Mr. Korman, vice-president of plaintiff, testified, "They secured orders for policies that we saw fit to write or reject. They did nothing else for us. They collected moneys for premiums but did nothing else for us until such time that we would submit a prospective insured whom we would either write the policy or reject it. * * * He was known more or less as a moving broker."

The evidence discloses Brunsian was paid a commission of 15 1/2% on this policy. He directed the plaintiff to send a part of his commission to Engelhardt-Korman & Co. any. It appears the commission was split between them. Brunsian testified, "I was a soliciting agent for the Mutual and several life insurance companies. * * * I always dealt with Mr. Stone." Stone was the president of the plaintiff company, and Brunsian negotiated the insurance contract with him. At the time this letter was written Brunsian had an office, and a man named Dorr was in it. Brunsian says of him, "He was never employed by me, but he was in my office when I moved from 188 W. Jackson Blvd. He was in the office at 330 E. Wells Street but that was not my office. My name was on the door but I did not run the office. He did work for me but I did not pay him for such work. He is an insurance broker on his own and he has his own business. He also assisted me in some of my business. My office is supposed to keep records of correspondence which goes out by the retention of copies. I have no records of the Imperial Insurance Agency. They have been thrown away."

4.

Plaintiff has filed an additional abstract. It discloses Paragraph 12 of the insurance contract, which provides:

"No condition or provision of this Policy shall be waived or altered except by endorsement attached hereto signed by the President or a Vice-President, Secretary, or Assistant Secretary of the Company; nor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract. Changes in the written portion of the Declarations forming part hereof (except Items 2, 3 and 4) may be made by the agent countersigning this Policy, such changes to bind the Company when initialed by such agent. The personal pronoun herein used to refer to this Employer or to an injured employee or dependents, shall apply regardless of number or gender."

The reply brief of defendants admits that "the burden of establishing either the actual or apparent authority of Imperial Insurance Agency (Brusslan) rests with the defendants in this case since such authority is asserted by us".

We hold there is no competent evidence tending to show this letter of January 19 was authorized, and that the court erred in admitting it in evidence. Apparently the trial judge so thought after reflection, for he disregarded it in his findings and judgment. We hold the court properly disregarded this letter as the findings and judgment show he did.

There is another reason why judgment must be affirmed. We hold the contract is not in any material respect ambiguous. The rider expressly says that the "adjustment of premium" will be made "at the termination of the Policy" on a basis of 50% loss ratio to the company, "to be figured on paid and outstanding claims", but in no event is the premium so developed to be higher or lower than the payroll audit developed at the following rates: Low rate, \$8.75; High rate, \$20.00. It is difficult to see how any rate could have been made more certain. The rate is as certain as arithmetic can make it.

Plaintiff has filed an additional abstract. It is enclosed.

Paragraph 12 of the insurance contract, which provides:

"No condition or provision of this policy shall be waived or altered except by endorsement attached hereto signed by the President or a Vice-President, Secretary, or Assistant Secretary of the Company; nor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract. Changes in the written portion of the Declaration forming part hereof (except those 2, 3 and 4) may be made by the agent counterbalancing this policy, such changes to bind the Company as to the insured by such agent. The personal promise herein need not refer to this Employer or to an injured employee or dependent, shall apply regardless of number of dependents."

The reply brief of defendants admits that "the burden

of establishing either the actual or apparent authority of Imperial Insurance Agency (Inc.) rests with the defendants in this case since such authority is asserted by us."

We hold there is no competent evidence tending to show this letter of January 19 was authorized, and that the court erred in admitting it in evidence. Apparently the trial judge so thought after reflection, for he disallowed it in his findings and judgment. We hold the court properly disallowed this letter as the findings and judgment show he did.

There is another reason why judgment must be affirmed.

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The rider expressly says that the "adjustment of premium" will be made "at the termination of the policy" on a basis of 50% loss ratio to the company, "to be figured on paid and outstanding claims", but in no event is the premium so developed to be higher or lower than the payroll which developed at the following rates: Low rate, \$0.75; High rate, \$0.00. It is difficult to see how any rate could have been made more certain. The rate is as certain as anything can make it.

5.

Plaintiff was not bound by the letter written without authority by one broker to another, and the judgment will be affirmed.

AFFIRMED.

O'Connor and Niemeyer, JJ., concur.

5.

Plaintiff was not bound by the letter written without authority by one broker to another, and the judgment will be affirmed.

ATTESTED.

O'Connor and Kiewit, J.L., counsel.

43617-43631

HERMAN M. SILVERSTEIN,
Appellant,

v.

BERKSHIRE LIFE INSURANCE
COMPANY, a corporation,
Appellee.

179 A
)
) No. 43631 is an appeal
)
) from Circuit Court of
)
) Cook County.
)

BERKSHIRE LIFE INSURANCE
COMPANY, a corporation,
Appellee,

v.

JACKSON REALTY AND MANAGEMENT
CORP., a corporation, and
HERMAN M. SILVERSTEIN,
Appellants.

323 I.A. 318²
)
) Nos. 43617 to 43630
)
) Interlocutory appeals
)
) from Superior Court of
)
) Cook County.
)

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Fourteen of these appeals are from the Superior, one from the Circuit Court. In each Superior Court case a receiver was appointed on motion of the plaintiff insurance company in a suit brought by it to foreclose a mortgage on real estate described in the complaint. The Circuit Court appeal is from orders dismissing the complaint filed by Silverstein against the insurance company to obtain temporary and permanent injunctions restraining the suits to foreclose these fourteen mortgages.

A temporary injunction issued, was set aside by stipulation, the matter heard on renewal of plaintiff's motion for an injunction and defendant's motion to dismiss the suit for want of equity on the face of the complaint and for lack of jurisdiction.

The indebtedness in the fourteen foreclosure suits is over \$1,073,000. The notes by their terms fell due December 31, 1941, but by written agreement were extended to December 31, 1944.

The suits in both courts were filed on the same day,

43617-43631

HERMAN A. STEINBERG
Appellant

v.

BERKSHIRE LIFE INSURANCE
COMPANY, a corporation,
Appellee

No. 43617 is an appeal

from Circuit Court of

Cook County.

33-1-A-118

No. 43617 to 43630

Interlocutory appeals

from Superior Court of

Cook County.

BERKSHIRE LIFE INSURANCE
COMPANY, a corporation,
Appellee

v.

JACKSON REALTY AND MANAGEMENT
CORP., a corporation, and
HERMAN A. STEINBERG,
Appellants

MR. PRESIDING JUSTICE ROBERT D. LIVINGSTON AND CLERK OF THE COURT.

Fourteen of these appeals are from the Superior Court, one

from the Circuit Court. In each Superior Court case a re-

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company in a suit brought by it to foreclose a mortgage on

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and permanent injunctions restraining the suits to foreclose

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isdiction.

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over \$1,000,000. The notes by their terms fell due September

31, 1941, but by written agreement were extended to December

31, 1944.

The suits in both courts were filed on the same day.

June 25, 1945; the complaints in the Superior Court at 3:15 P. M., the suit in the Circuit Court at 4:30 P. M. In other words, the foreclosure suits were filed one hour and fifteen minutes earlier than the injunction suit. The Circuit Court suit was dismissed on motion of the insurance company September 18, 1945. Applications of the insurance company for receivers were allowed in each Superior Court case the following day, September 19. The insurance company was sole plaintiff in each and all the foreclosure suits. Silverstein and Jackson Realty and Management Corporation were defendants. In the Circuit Court Silverstein was plaintiff and the insurance company, alone, defendant.

The briefs argue much about which court first obtained jurisdiction. Ill. Rev. Stat., chap. 110, sec. 5, seems to be clear to the effect that the filing of a complaint is the beginning of a suit and therefore gives the court jurisdiction. Silverstein does not deny the filing would give the court jurisdiction of the subject matter but on the authority of Union Mutual Life Ins. Co. v. University of Chicago, 6 Fed. 443, argues it was necessary to acquire exclusive jurisdiction that the court should also obtain jurisdiction of the person of the defendants. This is not the general rule. Certainly it is not the rule in Illinois. See Section 5 of the Illinois Civil Practice Act and Schroeder v. Merchants & Mechanics Ins. Co., 104 Ill. 71, 75; Vincent v. McElvain, 304 Ill. 160, 163. People v. Brewer et al., 328 Ill. 472, is cited to the contrary but is not applicable because the proceeding there was special and statutory under the Local Improvement Act, as amended in 1915.

Plaintiff is a foreign corporation under the laws of Massachusetts licensed in Illinois. Cost bonds were not filed

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P. M., the suit in the Circuit Court at 1:30 P. M. In other
June 25, 1947; the complaint in the foreclosing suit at 3:15

on beginning the suits in the Superior Court until after the defendants raised that question, when such bonds were filed. It is now argued the Superior Court was without jurisdiction until after the filing of the bonds. This court and the Supreme Court have held to the contrary. Plaff v. Pacific Express Company, 251 Ill. 243; Cramer v. Illinois Commercial Men's Ass'n., 176 Ill. App. 1, 12.

There was a close race here, but plaintiff won. The Superior Court having first obtained jurisdiction will retain it to the end of the litigation. Molan v. Barnes, 268 Ill. 515, 520; St. Louis Bridge Co. v. Eisele, 263 Ill. 50. We hold the Superior Court first obtained jurisdiction, and that the complaint in the Circuit Court was rightly dismissed.

As to the merits of this controversy, the issues between these parties were the same in the suits in both courts.

The titles to twenty-one tracts of land in Chicago were held in the names of nominees of the insurance company, who lived at Pittsfield, Massachusetts. Contracts to sell and buy were made between the holders of the titles and the Jackson Realty and Management Corporation. The corporation was, in fact, owned and controlled by Silverstein. Contracts for the purchase notes and trust deeds, all in writing and showing every material part of the transaction, were executed and delivered August 31, 1940. These documents disclose a complete integrated transaction, and copies thereof are attached to the complaint filed in the Circuit Court. The basis of the suit for injunction, as well as the defense in each of the fourteen suits to foreclose, is that prior to and on the day these written documents were executed, the insurance company entered into an oral agreement with defendant Silverstein that if he would buy seven parcels of land in addition to the other fourteen, the insurance company would at maturity extend the time

for payment of the notes given for the fourteen parcels until 1956, the date on which the mortgages and notes given for the seven additional tracts would mature. The insurance company by motion to dismiss raised the question in the suit in the Circuit Court, and also in the Superior Court, urged this defense to the suits ~~for~~ there could not be interposed successfully for the reason that it was an attempt to vary by oral, contemporaneous evidence the terms of a written contract. The complaint in the Circuit Court averred that the first extension agreement, extending the time for payment of the notes, was executed pursuant to this prior and contemporaneous oral agreement.

Defendants make the point that because no replications were filed by plaintiff in the Superior Court suits to this defense, the affirmative defense must stand admitted on the record. We hold to the contrary under the circumstances here appearing. On the hearing in the Superior Court, plaintiff offered to file replications. The court indicated he did not think it necessary. Defendant did not object. This amounted to a waiver. St. Louis A. & T. H. R. R. v. Brown, 34 Ill. App. 552, 555; Allen v. Michel, 38 Ill. App. 313, 318; 3 Corpus Juris 330; Walter Cabinet Co. v. Russell, 250 Ill. 416, 421; Eagle Indemnity Co. v. Hooker, 309 Ill. App. 406; Ford Motor Co. v. Nat. B. & I. Co., 294 Ill. App. 585.

✓ The rule that prior or contemporaneous oral agreements may not be interposed to vary the terms of a written contract is held by some authors to be not a rule of evidence but of substantive law. Wigmore, Evidence, 3rd Ed., Vol. 9, sec. 2400; 1 Restatement of the Law of Contracts, chap. 9, sec. 237. A leading case on this subject is Mitchell v. Lath, 247 N. Y. 377, 160 N. E. 646. The law announced by our Supreme Court is likewise. Telluride Power Co. v. Crane Co., 208 Ill. 218, 226. The

Defendants make the point that because no replications were filed by plaintiff in the Superior Court with respect to this defense, the affirmative defense must stand admitted on the record. We held to the contrary under the circumstances here appearing. On the hearing in the Superior Court, plaintiff offered to file replications. The court indicated he did not think it necessary. Defendant did not object. This amounted to a waiver. St. Louis, I. M. & N. R. Co. v. Brown, 34 Ill. App. 2d 552, 555; Allen v. Michael, 36 Ill. App. 3d 111, 113; 3 Compas 1 330; Walter Capner Co. v. Michael, 230 Ill. App. 425, 427; Walter Capner Co. v. Michael, 309 Ill. App. 406; Walter Capner Co. v. Michael, 304 Ill. App. 585.

The rule that prior or contemporaneous oral agreements may not be introduced to vary the terms of a written contract is held by some authors to be not a rule of evidence but of substantive law. Wigmore, Evidence, 3rd Ed., Vol. 9, sec. 2500; 1 Restatement of the Law of Contracts, Chap. 9, sec. 337. A leading case on this subject is Scott v. Little, 247 N. W. 2d 160 N. W. 2d. The law announced by our Supreme Court is likewise, Colinva Power Co. v. Crane Co., 208 Ill. 18, 226. The

Appellate Court has followed in Chicago Title & Trust Co. v. Cohen, 284 Ill. App. 181.

On this question other important circumstances appear in these cases. Silverstein, the purchaser, is a lawyer of experience. A perusal of the writings shows he was careful to have the writings include other provisions favorable to him. We naturally ask, why was this one left out? Even a layman is presumed to know the law. Not to unduly extend the opinion, we cite without comment other cases. Schulz v. Plankington Bank, 141 Ill. 116, 122; Schroer v. Wessell, 89 Ill. 113.

We also hold the alleged parol agreement was without consideration. Silverstein did not promise in the oral contract to do anything he was not already bound to do by the written contracts. Crossman v. Wohlleben, 90 Ill. 541; Strange v. Carrington Co., 116 Ill. App. 410, 413. Keith v. Radway, 221 Mass. 515, 109 N. E. 446, with other cases are cited in the reply brief for the first time but are distinguishable on this and other grounds. A proposed written agreement submitted by Silverstein to extend the time of payment of these fourteen notes provided also for the reduction of the principal indebtedness to \$893,000 the second year and to \$793,000 the third year of the extension. We shall not stop to discuss the question raised by the plaintiff that the alleged oral contract, covering a term of fifteen years, is void under the Statute of Frauds. 27 Corpus Juris 185; Hide & Leather Bank v. Alexander, 184 Ill. 416; Brown on Statute of Frauds, Sec. 284; Deutsch v. Textile Waist Co., 209 N. Y. S. 388; Green v. Pennsylvania Steel Co., 75 Md. 109, 23 Atl. 139. The argument that defendant is not bound by this parol rule because of part performance of the contract is not valid nor applicable to the facts, since the evidence shows

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v. Washington Bank, 141 Ill. 116, 122; Wentworth v. Cassell,

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We also hold the alleged parol agreement was without

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Stearns v. Washington Co., 116 Ill. App. 410, 412. Wright v.

Malay, 221 Mass. 215, 109 N. E. 446, with other cases are

cited in the reply brief for the first time but are distin-

guishable on this and other grounds. A proposed written

agreement submitted by Alvarestein to extend the time of pay-

ment of these fourteen notes provided also for the reduction

of the principal indebtedness to \$283,000 the second year

and to \$23,000 the third year of the extension. We shall

not stop to discuss the question raised by the plaintiff that

the alleged oral contract, covering a term of fifteen years,

is void under the statute of Truists. 27 Corporations 187;

Wade & Leitch Bank v. Alexander, 184 Ill. 416; Town on

Statute of Truists, Dec. 284; Pentecost v. Textile, 181 Ill. 109;

209 N. Y. 2. 388; Green v. Pennsylvania Steel Co., 75 Ill. 109.

23 Ill. 139. The argument that defendant is not bound by this

parol rule because of past performance of the contract is not

valid nor applicable to the facts, since the evidence shows

that whatever the purchaser may have done by way of improvements was exclusively referable to the written contracts and had no relation whatever to any alleged parol agreement.

All this is worthy of notice when we consider the propriety of the orders appointing receivers. We hold, after considering the evidence, the Superior Court did not err in the exercise of its discretion in this respect. There was no personal liability on the notes. The sole security was clearly scant and meager. The evidence to that effect was not contradicted. The debt was past due. The premises were in need of repairs. The mortgagee in the trust deeds had agreed to the appointment of receivers in case foreclosure bills were filed. We are quite aware that the last named fact does not justify the exercise of arbitrary power. We have read again and have been long familiar with Bagdonas v. Liberty Land & Investment Co., 309 Ill. 103; Frank v. Siegel, 263 Ill. App. 316; Klass v. Yavitch, 302 Ill. App. 229, and Seyfarth v. Leonard, 316 Ill. App. 139. We do not think the opinions in these cases inconsistent with the views herein expressed. We hold the trial court did not abuse its discretion in these Superior Court cases. Bagley v. Illinois Trust & Savings Bank, 199 Ill. 76.

In appeal No. 43617 appellants made a motion to strike pages 65 to 662 inclusive from the record and to strike comparable pages from the record in Nos. 43618 to 43630. The motion was reserved to the hearing. It is allowed.

In appeal No. 43631 the orders dismissing the suit of plaintiff in the Circuit Court are affirmed. In Nos. 43617 to 43630 the orders of the Superior Court are also affirmed.

ORDERS AFFIRMED.

Niemeyer, J., concurs.

O'Connor, J. I concur in the result but not in all that is said in the foregoing opinion.

that whatever the purchaser may have done by way of improvement
must be exclusively referable to the written contracts and
had no relation whatever to any alleged verbal agreement.
It is this is a matter of fact which the court is to
ascertain by the evidence. The court is to determine
after considering the evidence, the proper course of action
in the exercise of its discretion in this respect. There
was no personal liability on the notes. The sole security
was given by the bank and the bank. The evidence to that effect
was not controverted. The bank was not liable. The proceeds
were in need of repairs. The mortgage in the trust deeds
had agreed to the appointment of receivers in case of default
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does not justify the exercise of its discretion. The bank
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In appeal No. 1, the court is to determine the matter of fact
pages 65 to 66 inclusive from the record and to state
comparable pages from the record in Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

43530

ISABEL F. WOOLF,
Appellee,

v.

IRVING W. WOOLF,
Appellant.

100
A
APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

328 I.A. 319

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree granting plaintiff separate maintenance, awarding her \$150 per month for the support of herself and daughter and \$2,500 attorney's fees, and finding defendant in arrears on account of temporary maintenance and support theretofore ordered paid in the sum of \$2,533.34, and directing that execution issue therefor.

The original complaint charged defendant with adultery. On the trial the court stated that plaintiff had failed to prove the charge of adultery, and the complaint was amended to charge that the parties "separated on September 22, 1942, when defendant insisted in numerous conversations with plaintiff prior thereto that she 'get the hell out,' and by refusing to renew the lease on their apartment, in fact forced her to leave, and since said date plaintiff has lived separate and apart from defendant, without fault on her part." The decree found "That defendant refused to renew the lease on the apartment occupied by the parties, and in fact did not renew the lease, forcing the plaintiff to live elsewhere, without any fault on her part." In addition to her testimony relating to defendant's refusal to renew the lease to the apartment she and defendant and her daughter were occupying, or to provide suitable living quarters elsewhere, plaintiff testified to admissions by defendant of his infatuation for another woman and his desire for a separation. She also introduced the testimony

42530

ISABEL T. WOOLF,
Appellee,

v.

IRVING W. WOOLF,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

328 I.A. 319

MR. JUSTICE MILLER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree granting plaintiff separate maintenance, awarding her \$150 per month for the support of herself and daughter and \$500 attorney's fees, and finding defendant in arrears on account of temporary maintenance and support theretofore ordered paid in the sum of \$2,502.34, and directing that execution issue therefor.

The original complaint charged defendant with adultery.

On the trial the court stated that plaintiff had failed to prove the charge of adultery, and the complaint was amended to charge that the parties "separated on September 24, 1942,

when defendant insisted in numerous conversations with plaintiff

prior thereto that she 'get the hell out,' and by refusing

to renew the lease on their apartment, in fact forced her to

leave, and since said date plaintiff has lived separate and

apart from defendant, without fault on her part." The decree

found "That defendant refused to renew the lease on the apart-

ment occupied by the parties, and in fact did not renew the

lease, forcing the plaintiff to live elsewhere, without any

fault on her part." In addition to her testimony relating to

defendant's refusal to renew the lease to the apartment she and

defendant and her daughter were occupying, or to provide

suitable living quarters elsewhere, plaintiff testified to

admissions by defendant of his infatuation for another woman and

his desire for a separation. She also introduced the testimony

2.

of other persons to alleged admissions by the defendant supporting her claims. By stipulation the report of a private detective employed by plaintiff, showing meetings of defendant and the other woman involved and their affectionate conduct, ~~together,~~ though not adultery, was received in evidence. Defendant contradicted the testimony of the plaintiff, admitted knowing the other woman and of being with her on various occasions. His testimony falls far short of admissions establishing adultery. It does show conduct not to be expected from a loving husband and father of two children. The testimony tending to show defendant's infatuation with the other woman was competent as a circumstance to be considered by the court in weighing the testimony of plaintiff and defendant as to the reasons for and the facts leading to their separation. The trial judge, who heard the testimony and saw the witnesses, was in a far better position than this court is to judge of the credibility of the testimony presented, and we are not permitted on the record to disturb his finding.

Defendant is engaged in the advertising business. Plaintiff claims and defendant denies that prior to their separation he told her he was making around \$16,000 a year. The competent evidence in the record shows that not later than their separation his income had dropped to between five and six thousand dollars a year on account of war conditions. The testimony shows that plaintiff's attorney put in in the preparation of the complaint, order for injunction, drafting of notices, conferences with counsel, and deposition, 40-1/2 hours; and in court appearance and before a special commissioner, 54-1/2 hours; and that he had received from the defendant on account of services \$200. There is testimony by a lawyer, whose qualifications are admitted, that an attorney of the experience of plaintiff's counsel should get \$30 to \$40 an hour for court work and \$25 to \$30 an hour for office work, without consideration of the identity of the

of other persons to alleged admissions by the defendant supporting her claims. By stipulation the report of a private detective employed by plaintiff, showing meetings of defendant and the other woman involved and their a testionate conduct, xxxxxxxx though not adultery, was received in evidence. Defendant contradicted the testimony of the plaintiff, admitted knowing the other woman and of being with her on various occasions. His testimony falls far short of admissions establishing adultery. It does show conduct not to be expected from a loving husband and father of two children. The testimony tending to show defendant's infatuation with the other woman was competent as a circumstance to be considered by the court in weighing the testimony of plaintiff and defendant as to the reasons for and the facts leading to their separation. The trial judge, who heard the testimony and saw the witnesses, was in a far better position than this court is to judge of the credibility of the testimony presented, and we are not permitted on the record to disturb his finding.

Defendant is engaged in the advertising business. Plaintiff claims and defends a denial that prior to their separation he told her he was making around \$15,000 a year. The competent evidence in the record shows that not later than their separation his income had dropped to between five and six thousand dollars a year on account of war conditions. The testimony shows that plaintiff's attorney was not in the preparation of the complaint, order for injunction, granting of notices, conferences with counsel, and deposition, 40-1/2 hours; and in court appearance and before a special commissioner, 24-1/2 hours; and that he had received from the defendant on account of services \$200. There is testimony by a lawyer, whose qualifications are admitted, that an attorney of the experience of plaintiff's counsel should at 20 to 40 an hour for court work and 25 to 30 an hour

parties, their ability to pay, the results accomplished, or the nature of the litigation. The court awarded plaintiff \$2,500 on account of services rendered by her attorney. Defendant contends that this is grossly excessive. In the present case neither the questions of fact nor the questions of law were involved or intricate. In Metheny v. Bohn, 164 Ill. 495, 499, the court said: "In fixing the amount of a reasonable fee, the examination should be directed to what is customary for such legal services where contracts have been made with persons competent to contract, and not what is reasonable, just and proper for the solicitor in the particular case. The inquiry should be, not what an attorney thinks is reasonable, but what is the usual charge." In Johnson v. Johnson, 125 Ill. 510, 521, as a separate maintenance proceeding, it was held that allowance of solicitor's fees should be made not only in view of the services rendered or to be rendered, but also the ability of the party against whom the order is made to pay the same. The allowance here made is approximately one-half the yearly income of the defendant, who has already paid \$200 on account of attorney's fees for plaintiff. The amount allowed appears to be greatly excessive. This court on appeal is permitted to consider its own experience in determining what is a reasonable attorney's fee to be allowed. Hutchinson v. Hutchinson, 105 Ill. App. 349, 351; Church v. Church, 324 Ill. App. 557, 563.

Complaint is also made that the court should have reduced the temporary allowance for maintenance and support \$50 a month because of the absence of the son of plaintiff and defendant in the armed forces. There is no evidence in the record showing when the son went into military service, and the question of the reduction, if any, of this allowance was a matter in the discretion of the trial court, and we cannot say that it has been abused.

parties, their ability to pay, the results accomplished, or the nature of the litigation. The court awarded plaintiff \$2,500 on account of services rendered by her attorney.

Defendant contends that this is grossly excessive. In the present case neither the questions of fact nor the questions of law were involved or intricate. In McHenry v. Johns,

104 Ill. 432, 409, the court said: "In fixing the amount of a retainer fee, the examination should be directed to what is customary for such legal services where contracts have been made with persons competent to contract, and not what is reasonable, just and proper for the solicitor in the particular case. The inquiry should be, not what an attorney thinks is reasonable,

but what is the usual charge." In Johnson v. Johnson, 123 Ill. 510, 521, a separate maintenance proceeding, it was held that allowance of solicitor's fees should be made not only in view of the services rendered or to be rendered, but also the ability of the party against whom the order is made to pay.

The allowance here made is approximately one-half the yearly income of the defendant, who has already paid \$200 on account of attorney's fees for plaintiff. The amount allowed appears to be grossly excessive. This court on a trial is permitted to consider its own experience in determining what is a reasonable

attorney's fee to be allowed. Hutchinson v. Hutchinson, 105

Ill. App. 349, 351; Church v. Church, 324 Ill. App. 517, 532.

Complaint is also made that the court should have reduced the temporary allowance for maintenance and support \$50 a month because of the absence of the son of plaintiff and defendant in the armed forces. There is no evidence in the record showing when the son went into military service, and the question of the reduction, if any, of this allowance was a matter in the discretion of the trial court, and we cannot say that it has

been abused.

4.

The decree of the trial court is affirmed in all respects except as to the allowance of attorney's fees. The cause is remanded with directions to fix this allowance at \$1,000. All costs of the appeal are taxed against the defendant.

AFFIRMED EXCEPT AS TO ALLOWANCE
OF ATTORNEY'S FEES, AS TO WHICH
CAUSE IS REMANDED WITH DIRECTIONS
TO FIX AT \$1,000; ALL COSTS OF
APPEAL TAXED AGAINST DEFENDANT.

Matchett, P. J., and O'Connor, J., concur.

The decree of the trial court is affirmed in all respects except as to the allowance of attorney's fees. The costs are remanded with directions to fix this allowance at \$1,000. All costs of the appeal are taxed against the defendant.

APPEAL FROM THE TRIAL COURT IN THE
CASE OF THE PEOPLE OF THE STATE OF ILLINOIS
VS. JOHN J. MURPHY
TO FIX AT \$1,000; ALL COSTS OF
A FINAL JUDGMENT AGAINST DEFENDANT.

Matchett, P. J., and O'Connor, J., concur.

43544

JANET ROLAND,
Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation,
Appellant.

181 A
APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

328 I.A. 320'

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$2,500 entered against it in an action for personal injuries sustained by plaintiff as a result of a fall due to a hole or depression in an alley extending south from 67th to 68th street between Carpenter and Morgan streets in Chicago. The sole question presented is whether the trial court should have directed a verdict for defendant.

The accident occurred on Sunday evening, May 9, 1937, about 7 or 7:30 o'clock. Plaintiff was then living on Carpenter street near 68th street. Her son lived in the same block, on Morgan street near 67th street. Plaintiff was returning to her home through the alley after a visit to her son; the day of the accident was clear and it was dusk; she could see in front of her 30 or 40 feet, maybe more; there was no obstruction of any kind to her view; the lighting condition was about the same as in the court room at the time of the trial, when she could see all the way across the room about 25 feet and could see the pencil counsel for defendant was holding in his hand; the son had moved into his Morgan street home the preceding October; plaintiff nearly always took the alley on her visits to him and her return to her home because it was a short cut, and had passed the particular spot where she was injured, 100 times or more. The hole or depression causing plaintiff's injury

JAMES POLAND,
Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation,
Appellant.

FILED FOR
CLERK OF COURT
JULY 2, 1917

3281A 320

MR. JUSTICE WINTERKNECHT delivered the opinion of the court.

Defendant appeals from a judgment for \$2,500 entered against it in an action for personal injuries sustained by plaintiff as a result of a fall due to a hole or depression in an alley extending south from 63th street between Carpenter and Morgan streets in Chicago. The sole question presented is whether the trial court should have directed a verdict for defendant.

The accident occurred on Sunday evening, July 2, 1917, about 7 or 7:30 o'clock. Plaintiff was then living on Carpenter street near 63th street. Her son lived in the same block on Morgan street near 63th street. Plaintiff was returning to her home through the alley after a visit to her son; the day of the accident was clear and it was dark; her son was in front of her 30 or 40 feet, maybe more; there was no obstruction of any kind to her view; the lighting condition was about the same as in the court room at the time of the trial, when she could see all the way across the room about 25 feet and could see the pencil counsel for defendant was holding in his hand; the son had moved into his Morgan street home the preceding October; plaintiff nearly always took the alley on her visits to him and her return to her home because it was a short cut, and had passed the particular spot where she was injured, 100 times or more. The hole or depression causing plaintiff's injury

2.

was about 5 feet long, 3 feet wide, and sloped to a depth of about 6 inches; it was in the center of the alley, which was 20 feet wide, and there were unobstructed passageways approximately 7 feet wide on each side of the hole. Plaintiff testified that she had probably noticed the hole a number of times before the accident when she visited her son; she had never stumbled in the hole before that time; she did not think she ever walked over it before; she must have gone around it. "I didn't see it when I fell in it." "I wasn't noticing it then." "I did not notice it." "I knew it was there."

In Illinois Central R. Co. v. Oswald, 338 Ill. 270, 274, the court said: "In the absence of willful or wanton injury on the part of the defendant the plaintiff cannot recover in an action for personal injuries unless it appears he was in the exercise of ordinary care for his safety, and in such case it is the duty of the court to direct a verdict for the defendant if there is no evidence tending to show affirmatively that the plaintiff was exercising due care or to raise a reasonable inference of such care. A party has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution." To the same effect are Pienta v. Chicago City Ry. Co., 284 Ill. 246, 251; Wilson v. Illinois Central R. Co., 210 Ill. 603, 607. Plaintiff cites cases such as City of Mattoon v. Faller, 217 Ill. 273; Wallace v. City of Farmington, 231 Ill. 232; and Village of Clayton v. Brooks, 150 Ill. 97, holding that the mere passing over a sidewalk known to be defective is not per se contributory negligence. Plaintiff also cites City of Chicago v. Babcock, 143 Ill. 358, where it was held that a pedestrian may ordinarily assume that a sidewalk is in a reasonably safe condition for travel and is not absolutely bound

was about 5 feet long, 3 feet wide, and sloped to a depth of about 6 inches; it was in the center of the alley, which was 20 feet wide, and there were unobstructed passageways approximately 7 feet wide on each side of the hole. Plaintiff testified that she had previously noticed the hole a number of times before the accident when she visited her son; she had never stumbled in the hole before that time; she did not think she ever walked over it before; she must have gone around it. "I didn't see it when I fell in it." "I wasn't noticing it then." "I did not notice it." "I knew it was there."

In Illinois Central P. Co. v. Gervais, 358 Ill. 270, 274,

the court said: "In the absence of willful or wanton injury on the part of the defendant the plaintiff cannot recover in an action for personal injuries unless it appears he was in the exercise of ordinary care for his safety, and in such case it is the duty of the court to direct a verdict for the defendant if there is no evidence tending to show affirmatively that the plaintiff was exercising due care or to raise a reasonable inference of such care. A party has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution." To the same effect are Florida v. Orleans City Ry. Co., 284 Ill. 246, 251; Illinois Central P. Co. v. Wilson, 210 Ill. 603, 607. Plaintiff cites cases such as City of Matteson v. Fallert, 217 Ill. 273; Illinois v. City of Farmington, 231 Ill. 522; and Willard v. Clayton v. Brooks, 180 Ill. 97, holding that the mere passing over a sidewalk known to be defective is not per se contributory negligence. Plaintiff also cites City of Chicago v. Babcock, 148 Ill. 328, where it was held that a pedestrian may ordinarily assume that a sidewalk is in a reasonably safe condition for travel and is not absolutely bound

3.

to keep his eye constantly fixed on the sidewalk in search of possible holes or other defects therein. That case can have no application here because the plaintiff admittedly knew of the defect in the alley now complained of and had passed around it at least 100 times. Furthermore, she admits that she did not notice the hole before stepping into it and falling, although at the time she could see 30 or 40 feet, maybe more, in front of her. Having knowledge of the defect in the alley, she could not rely upon the assumption of its reasonably safe condition for travel. The care required of her was commensurate with the known conditions which confronted her and would require that she observe where she was walking as she approached the hole in which she fell. There being a complete absence of any evidence showing care on the part of the plaintiff, the court should have directed a verdict. Reiter v. City of Chicago, 303 Ill. App. 60 (Abat.); Illinois Central R. Co. v. Oswald, 338 Ill. 270; Dee v. City of Peru, 343 Ill. 36, 42.

The judgment is reversed.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

to keep his eye constantly fixed on the sidewalk in search of possible holes or other defects therein. That one can have no application here because the plaintiff admittedly knew of the defect in the alley not contained at and did not know of it at least 100 times. That error, the court stated, she did not notice the hole before stepping into it and falling, although at the time she could see 30 or 40 feet, maybe more, in front of her. Having knowledge of the defect in the alley, she could not rely upon the assurance of its reasonably safe condition for travel. The care required of her was commensurate with the known condition which confronted her and would require that she observe where she was walking as she approached the hole in which she fell. There being complete absence of any evidence showing care on the part of the plaintiff, the court should have directed a verdict. Reilly v. City of Chicago, 308 Ill. App. 60 (1st dist.); Illinois Central R. Co. v. Cowley, 308 Ill. App. 60 (1st dist.); City of Chicago v. Cowley, 308 Ill. App. 60 (1st dist.). The judgment is reversed.

REVEREND.

Matchett, J., and O'Connor, J., concur.

43565

CHICAGO CAR ADVERTISING COMPANY,
a corporation,

Appellee,

v.

VAN GRAY, also known as VANDORF
GRAY,

Appellant,

BANK OF MONTREAL, a corporation,
Garnishee-Appellee and
Cross-Appellant,

COOK COUNTY COUNCIL VETERANS OF
FOREIGN WARS OF THE UNITED STATES,
a corporation,
Petitioner-Appellee.

182 A
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

328 I.A. 320⁷

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff instituted garnishment proceedings on its judgment against the defendant. The garnishee bank answered that it had \$4,091.99 on deposit to the credit of the defendant in an account designated as Van Gray, doing business as Veterans of Foreign Wars of U. S. Rodeo. Judgment was entered against the garnishee for the use of plaintiff for \$738.30, which judgment was satisfied on the day of its entry. No question is raised on this appeal as to the satisfaction of that judgment. No disposition of the sum of \$3,353.69 remaining on deposit with the bank was made by order of the court.

Within 30 days from the entry of the judgment against the garnishee, the petitioner Cook County Council of the Veterans of Foreign Wars of the United States, a corporation (hereafter called the Council), intervened, claiming to be the owner of the funds on deposit with the bank. Defendant appearing specially, moved to dismiss the petition of the Council on the ground that the judgment in favor of plaintiff having been satisfied, the court had lost jurisdiction of the subject matter, and that petitioner "is an outside creditor, if any, and has no standing before this court in connection with the vacating

CHICAGO GAR ADVERTISING COMPANY,
a corporation,
Appellee,

v.

VAN GRAY, also known as VANDER
GRAY,
A Plaintiff,

BANK OF MONTREAL, a corporation,
Garnishee-Appellee and
Cross-Appellant,

COOK COUNTY COUNCIL VETERANS OF
FOREIGN WARS OF THE UNITED STATES,
a corporation,
Petitioner-Appellee.

RECEIVED
JAN 10 1930
CHICAGO

3221 A 320

U. S. JUSTICE DEPARTMENT DELIVERED FOR THE COURT.

Plaintiff instituted garnishment proceedings on its
judgment against the defendant. The garnishee bank answered
that it had \$4,091.22 on deposit to the credit of the defendant
in an account designated as Van Gray, doing business as
Veterans of Foreign Wars of U. S. Lodge. Judgment was entered
against the garnishee for the use of Plaintiff for \$383.30,
which judgment was satisfied on the day of its entry. No
question is raised on this appeal as to the satisfaction of
that judgment. No disposition of the sum of \$383.30
remaining on deposit with the bank was made by order of the court.
Within 30 days from the entry of the judgment against
the garnishee, the petitioner Cook County Council of the
Veterans of Foreign Wars of the United States, a corporation
(hereafter called the Council), intervened, claiming to be the
owner of the funds on deposit with the bank. Defendant appearing
specially, moved to dismiss the petition of the Council on the
ground that the judgment in favor of Plaintiff having been
satisfied, the court had lost jurisdiction of the subject matter,
and that petitioner "is an outside creditor, if any, and has no
standing before this court in connection with the vacating

2.

of the original judgment or the judgment entered against the garnishee defendant." This motion was not passed upon. After a hearing on which defendant offered no evidence, judgment was entered in favor of petitioner and against the garnishee for \$3,353.69. From this judgment defendant appeals, and the garnishee filed notice of cross-appeal from the same judgment. Defendant has withdrawn its objection to the jurisdiction of the trial court to permit petitioner to intervene, and the sole question now presented is whether petitioner is the owner of the funds now on deposit with the garnishee so as to be entitled to intervene in the garnishment proceeding.]

Under date of August 4, 1944 defendant and petitioner entered into an agreement for the presentation of a rodeo in Soldier Field at Chicago, Ill., on September 9 and 10, 1944. In this agreement the defendant was referred to as producer, and petitioner as the Council. This agreement provided that the producer should hire, employ and engage all acts and performers for the show and provide all horses, ponies, steers, bulls, calves, and such other livestock as shall be required, and shall procure all necessary printing and advertising matter - all contracts for the above to be approved by the Council; that the producer shall pay all expenses in connection with the rodeo, except the cost of distribution and sale of tickets by the Council or individual Veterans of Foreign Wars of the U.S. posts; that the producer should furnish a bond to guarantee the presentation of the rodeo, and also furnish specific public indemnity insurance, and that the producer save and keep the Council free and harmless of and from any and all claims whatsoever arising out of the contract and indemnify the Council against any and all such claims; that any commissions and costs of distribution and sale of tickets made through the Council itself or any of its individual posts shall be borne by the Council and that any

of the original judgment or the judgment entered against the
Garnishes defendant. "This motion was not passed upon. After
a hearing on which defendant offered no evidence, judgment was
entered in favor of petitioner and against the garnishes for
\$2,352.63. From this judgment appeal was taken, and the
garnishes filed notice of cross-appeal from the same judgment.
Defendant has withdrawn its objection to the jurisdiction of
the trial court to permit petitioner to intervene, and the sole
question now presented is whether petitioner is the owner of
the funds now on deposit with the garnishes so as to be entitled
to intervene in the garnishment proceedings.

Under date of August 1, 1944 defendant and petitioner
entered into an agreement for the presentation of a petition in
Soldier Field at Chicago, Ill., on September 9 and 10, 1944. In this
agreement the defendant was referred to as producer, and petitioner
as the Council. This agreement provided that the producer should
hire, employ and engage all men and women for the show
and provide all horses, ponies, steers, bulls, calves, and
such other livestock as shall be required, and shall procure
all necessary printing and advertising matter - all contracts
for the above to be approved by the Council; that the producer
shall pay all expenses in connection with the show, except the
cost of distribution and sale of tickets by the Council;
that the individual Veterans of Foreign Wars of the U.S.A. post; that the
producer should furnish a bond to guarantee the presentation of
the show, and also furnish specific public liability insurance,
and that the producer save and keep the Council free and
harmless of and from any and all claims whatsoever arising out
of the contract and indemnify the Council against any and all
such claims; that any commissions and costs of distribution
and sale of tickets shall be borne by the Council and that any
its individual posts shall be borne by the Council and that any

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and all tickets delivered to the Council by the producer shall be returned by the Council if unsold, or if sold, the full face cash value thereof shall be returned by the Council prior to final accounting; that the gross proceeds after paying all costs, charges and expenses shall be distributed two-thirds to the producer and one-third to the Council; that "the Producer shall immediately, and within 10 days following the last performance and presentation of said production or show, prepare and submit to the Council a full and complete audit and statement of all receipts and disbursements whatsoever in connection with said show or production, and shall immediately pay over and deliver to the Council such amount or amounts as shall be found to be due to the Council by virtue of this contract as its portion of the net profits of said show or production"; that should there be no profits, or if the said production results in loss, then any and all loss or losses shall be borne entirely by the producer, who by the agreement releases all claims against the Council by virtue of any loss incurred under operation of the contract.

Defendant opened his account with the garnishee on August 26, 1944. September 8, 1944 defendant notified the garnishee that all checks and drafts drawn on the account were to be countersigned by either D. H. Caplow or Carl R. Olsen along with defendant's signature. At that time Caplow was Judge Advocate of the Council and Olsen was Commander. On October 7, 1944 defendant by letter to the garnishee withdrew, countermanded and canceled the foregoing instruction and directed the garnishee to honor all checks thereafter drawn on the account when signed by him individually. Shortly after the presentation of the rodeo, defendant presented to the Council a report showing gross receipts of \$67,686.45, total expenses \$64,815.38, leaving a net balance of \$2,871.07. The Council claims an overcharge of \$13,531.03.

and all tickets delivered to the Council by the producer shall be returned by the Council if unused, or if sold, the full face cash value thereof shall be returned by the Council prior to final accounting; that the gross proceeds after paying all costs, charges and expenses shall be distributed two-thirds to the producer and one-third to the Council; that "the producer shall immediately, and within 10 days following the last performance and presentation of said production or show, prepare and submit to the Council a full and complete audit and statement of all receipts and disbursements. In case of non-compliance with said provision, and shall immediately pay over and deliver to the Council such amount or amounts as shall be found to be due to the Council by virtue of this contract as its portion of the net profits of said show or production"; that should there be no profits, or if the said production results in loss, then any and all loss or losses shall be borne entirely by the producer, who by this agreement releases all claims against the Council by virtue of any loss incurred under operation of the contract.

Defendant opened his account with the Guarantee on August 26, 1944. Defendant A, 1944 defendant notified the Guarantee that all checks and drafts drawn on the account were to be countersigned by either H. H. Galloway or Earl H. Olson along with defendant's signature. At that time Galloway was Judge Advocate of the Council and Olson was Commander. On October 7, 1944 defendant by letter to the Guarantee withdrew, countermanded and canceled the foregoing instruction and directed the Guarantee to honor all checks thereafter drawn on the account when signed by him individually. Shortly after the presentation of the robes, defendant presented to the Council a report showing gross receipts of \$7,824.45, total expenses \$64,815.28, leaving a net balance of \$,671.07. The Council claims an overpayment of \$2,551.07.

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Petitioner's right to intervene is based upon section 11, chapter 62, Illinois Revised Statutes 1945. This right is restricted to persons claiming to be owners of or having a direct interest in the property or funds held by the garnishee, and is not available to a simple contract creditor. May v. Disconto Gesellschaft, 211 Ill. 310, 316. Petitioner tried its case on the theory that it was the owner of this particular fund. Its rights must be determined by the written agreement between it and defendant. This agreement contains no provisions for the keeping of the proceeds derived from the presentation of the show, except that they should be turned over to the producer. No right or interest in the proceeds, as such, is given to the Council. After the presentation of the rodeo defendant contracted to submit to the Council a full and complete audit and statement of all receipts and disbursements whatsoever in connection with the production, and to immediately pay over and deliver to the Council such amount or amounts as shall be found to be due to the Council as its one-third of the net profits of the production. The Council cites no authority in support of its claim of ownership of the fund. The contract does not create such ownership. Defendant is left free to exercise his judgment in the preservation and safekeeping of the proceeds received by him and as to the disbursement of them. He is under no obligation to account to the Council until after the presentation of the rodeo, when he is required to pay over to the Council the amount or amounts found to be due it as its share of the profits. This merely creates the relation of debtor and creditor. Had the bank in which defendant made his deposits failed, or had the money been stolen without fault of defendant before he had deposited it with the bank, the loss arising therefrom would have^{had}/to be borne by the defendant alone. Petitioner therefore was without right to intervene in the

Petitioner's right to intervene is based upon section 11, chapter 62, Illinois Revised Statutes 1963. This right is restricted to persons claiming to be owners of or having direct interest in the property or funds held by the bank, and is not available to a simple contract creditor. May v. Disconto Gesellschaft, 211 Ill. 310, 318. Petitioner tried its case on the theory that it was the owner of this particular fund. Its rights must be determined by the written agreement between it and defendant. This agreement contains no provisions for the keeping of the proceeds derived from the presentation of the show, except that they should be turned over to the producer. No right or interest in the proceeds, as such, is given to the Council. After the presentation of the notes defendant contracted to submit to the Council a full and complete audit and statement of all receipts and disbursements whatsoever in connection with the production, and to immediately pay over and deliver to the Council such amount or amounts as shall be found to be due to the Council as its one-third of the net profits of the production. The Council owes no authority in support of its claim of ownership of the fund. The contract does not create such ownership. Defendant is left free to exercise his judgment in the preservation and safekeeping of the proceeds received by him and as to the disposition of them. He is under no obligation to account to the Council until after the presentation of the notes, when he is required to pay over to the Council the amount or amounts found to be due it as its share of the profits. This merely gives as the relation of debtor and creditor. Had the bank in which defendant made his deposits failed, or had the money been stolen without fault of defendant before he had deposited it with the bank, the loss arising therefrom would have ^{had} to be borne by the defendant alone. Petitioner therefore was without right to intervene in the

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garnishment proceeding.

The judgment is reversed and the cause remanded with directions to enter judgment against the garnishee in favor of defendant for the amount of the funds in possession of the garnishee.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and O'Connor, J., concur.

reimbursement proceeding.

The judgment is reversed and the cause is retried with directions to enter judgment against the garnishee in favor of defendant for the amount of the funds in possession of the garnishee.

REVEREND AND HONORABLE JUSTICES.

McIntosh, J., and O'Connor, J., concur.

43599

MARJORIE E. SHEFFIELD,
Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,
JOSEPH WINKLER and
PAIGE WALLACE, Incorporated,
Defendants.

On Appeal of CITY OF CHICAGO,
a Municipal Corporation,
Appellant.

183
A
APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

328 I.A. 321

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant City of Chicago appeals from a judgment for \$5,000 entered against it and Joseph Winkler upon the verdict of a jury in an action for personal injuries sustained by plaintiff, who fell into a coal hole in a public sidewalk in front of the property of Joseph Winkler in Chicago. No testimony was introduced on behalf of the defendants.

Plaintiff, who was employed by her husband, left his place of business in the company of a fellow-employee and walked to the intersection of Orleans street and Grand avenue with the intention of taking a street car home; it was about 10:30 p. m. on a cold night, and no street car being immediately available they walked eastward on the south side of Grand avenue a little over a block to a point in front of defendant Winkler's property; there was a coal hole in the center of the sidewalk in front of this property; it was covered with a metal cover; as plaintiff stepped on the right side of this cover it tipped up, turned over and rolled away and plaintiff went down into the hole about half way up to her thighs; she had never been over that sidewalk before and did not know the coal hole was there; there was no light in front of defendant Winkler's building; there was a light on the southwest corner of Wells and Grand avenue, about 70 or 75 feet west of the place of the

MARION E. SHEPHERD, Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation, JOSEPH WINKLER and PAIGE WALLACE, Incorporated, Defendants.

On Appeal of CITY OF CHICAGO, a Municipal Corporation, Appellant.

U.S. DISTRICT COURT
SOUTHERN DISTRICT
CITY OF CHICAGO

321 I.A. 321

MR. JUSTICE NIEMMYER DELIVERED THE OPINION OF THE COURT.

Defendant City of Chicago appeals from a judgment for \$5,000 entered against it and Joseph Winkler upon the verdict of a jury in an action for personal injuries sustained by plaintiff, who fell into a coal hole in a public sidewalk in front of the property of Joseph Winkler in Chicago. No testimony was introduced on behalf of the defendants. Plaintiff, who was employed by her husband, left his place of business in the company of a fellow-employee and walked to the intersection of Orleans street and Grand avenue with the intention of taking a street car home; it was about 10:30 p. m. on a cold night, and no street car being immediately available they walked eastward on the south side of Grand avenue a little over a block to a point in front of defendant Winkler's property; there as a coal hole in the center of the sidewalk in front of this property; it was covered with a metal cover; as plaintiff stepped on the right side of this cover it tipped up, turned over and rolled away and plaintiff went down into the hole about half way up to her thighs; she had never been over that sidewalk before and did not know the coal hole was there; there was no light in front of defendant Winkler's building; there was a light on the southwest corner of "ella and Grand avenue, about 70 or 75 feet west of the place of the

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accident, and a small street light on the other side of Grand avenue about 85 or 100 feet east of Wells street; there was no defect in the sidewalk adjacent to the hole; the sidewalk for at least 2 or 3 feet on each side of the coal hole was covered with small particles and lumps of coal and coal dust; plaintiff could not see far ahead of her because she was in her own shadow; she could see the sidewalk and the black colored coal on it; she felt the crunching of the coal under her feet for a distance of 2 to 4 feet before she fell; she was not alarmed by the crunching, and in response to the question on cross-examination, "That is just natural for you to walk along and start over that, and you were not on your care at all," she answered, "Yes."

A witness who had lived on Grand avenue for a number of years testified that the coal hole involved here was in front of her house, a few feet from the doorway; that the coal hole cover did not fit; it was about 2 inches too small for the hole; that such condition had existed over 5 or 6 years; that on one occasion she had stepped on the edge of the hole and noticed that the cover raised about 2 inches; that she always walked around the coal hole.

Plaintiff restricts her right to recover to the charge in her complaint that "The defendants then and there carelessly and negligently kept and maintained said hole in said sidewalk and the cover over the same in a loose, insecure and unfastened condition." This charge covers the conditions shown by the testimony, and defendant's objection on that point is untenable, as is its objection that the conditions shown indicate a latent defect with which defendant could not be charged in the absence of direct notice or knowledge. Defendant further contends that plaintiff's answer to the question quoted above was a judicial admission of want of due care on her part, foreclosing recovery

accident, and a small street light on the other side of Grand
 avenue about 85 or 100 feet east of Wells street; there was
 no defect in the sidewalk adjacent to the hole; the sidewalk
 for at least 2 or 3 feet on each side of the coal hole was
 covered with small particles and lumps of coal and coal dust;
 plaintiff could not see far ahead of her because she was in her
 own shadow; she could see the sidewalk and the black colored
 coal on it; she felt the crunching of the coal under her feet
 for a distance of 2 to 4 feet before she fell; she was not
 alarmed by the crunching, and in response to the question on
 cross-examination, "That is just natural for you to walk along
 and start over that, and you were not on your guard at all,"
 she answered, "Yes."

A witness who had lived on Grand avenue for a number of
 years testified that the coal hole involved here was in front
 of her house, a few feet from the doorway; that the coal hole
 cover did not fit; it was about 3 inches too small for the hole;
 that such condition had existed over 5 or 6 years; that on one
 occasion she had stepped on the edge of the hole and noticed
 that the cover raised about 2 inches; that she always walked
 around the coal hole.

Plaintiff restates her right to recover to the charge
 in her complaint that "The defendants then and there carelessly
 and negligently kept and maintained said hole in said sidewalk
 and the cover over the same in a loose, insecure and unstrengthened
 condition." This charge covers the conditions shown by the
 testimony, and defendant's objection on that point is untenable,
 as is its objection that the conditions shown indicate a latent
 defect with which defendant could not be charged in the absence
 of direct notice or knowledge. Defendant further contends that
 plaintiff's answer to the question quoted above was a judicial
 admission of fault of due care on her part, foregoing recovery

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by her. The most that can be said from defendant's standpoint of plaintiff's answer to the rather clumsily worded question put to her on cross-examination, is that the answer was the statement of a conclusion and not a fact, and therefore not binding upon her. Pienta v. Chicago City Ry. Co., 284 Ill. 246, 255-256; Central Ry. Co. v. Allmon, 147 Ill. 471, 480-481; People v. Pfanschmidt, 262 Ill. 411. Whatever plaintiff's opinion may have been, she was entitled to have her case submitted on all the facts before the jury, even though some of them may have been inconsistent with her testimony. In People v. Scalisi, 324 Ill. 131, 145, the court said: "Plaintiffs in error were entitled to have the jury instructed not only as to the law applicable to the state of facts testified to by them, but applicable to any state of facts which the jury might legitimately find from the evidence to have been proven. A defendant is entitled to the benefit of any defense shown by the entire evidence, even if the facts on which such defense is based are inconsistent with the defendant's own testimony." The question of plaintiff's lack of due care was a question for the jury (City of Chicago v. Babcock, 143 Ill. 358; Puck v. City of Chicago, 281 Ill. App. 6), and upon the record before us we are bound by the verdict.

Defendant's next objection is that the verdict is excessive in that the jury was permitted to consider as damages earnings lost by reason of plaintiff's inability to work for her husband, and hospital expenses which had been paid by plaintiff's husband, and the doctor's bill, and that the judgment entered should be reduced by the amounts of these items. The testimony covering these items was received without objection. No motion was made to strike the testimony and no instruction tendered directing the jury to exclude it in consideration of the damages,

by her. The meat that can be said from defendant's standpoint of plaintiff's answer to the rather closely worded question put to her on cross-examination, is that the answer was the statement of a conclusion and not a fact, and therefore not binding upon her. People v. Chicago City Ry. Co., 284 Ill. 246, 252-253; Central Ry. Co. v. Almon, 147 Ill. 471, 480-481; People v. Pinnock, 282 Ill. 411. However plaintiff's opinion may have been, she was entitled to have her case submitted on all the facts before the jury, even though some of them may have been inconsistent with her testimony. In People v. Scallie, 324 Ill. 131, 143, the court said: "Plaintiff in error was entitled to have the jury find not only as to the law applicable to the state of facts testified to by them, but applicable to any state of facts which the jury might legitimately find from the evidence to have been proven. A defendant is entitled to the benefit of any defense shown by the entire evidence, even if the facts on which such defense is based are inconsistent with the defendant's own testimony." The question of plaintiff's lack of due care was a question for the jury (City of Chicago v. Pinnock, 145 Ill. 388; People v. City of Chicago, 281 Ill. App. 6), and upon the record before us we are bound by the verdict.

Defendant's next objection is that the verdict is excessive in that the jury was permitted to consider as damages awarded lost by reason of plaintiff's inability to work for her husband, and hospital expenses which had been paid by plaintiff's husband, and the doctor's bill, and that the judgment entered should be reduced by the amount of these items. The testimony covering these items was received without objection. No motion was made to strike the testimony and no instruction tendered directing the jury to exclude it in consideration of the damages,

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if any, to be awarded. The present objection is purely an afterthought and cannot be considered.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

it may, to be awarded. The present objection is merely
an afterthought and cannot be considered.
The judgment is affirmed.

ASTORIA.

Ketchett, P. J., and O'Donnell, J., concur.

43474

R. S. SCHERMERHORN and ROBERT A.
YOUNG, Co-partners, Trading as
Schermerhorn-Young Sales Company,
Appellees,

v.

ROLYAN CORPORATION, a Corpora-
tion,

Appellant.

185 A
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

328 I.A. 322

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed their complaint in chancery against defendant alleging that on June 13, 1941, they entered into a written agreement with defendant whereby they were to be the sales' representatives of defendant in the states of Texas, Oklahoma, Arkansas and Louisiana; that they performed services and that under the terms of the contract they were entitled to commissions some of which, aggregating \$12,010.51, had not been paid. They prayed for an accounting and a decree for the amount found to be due.

Defendant denied that it owed plaintiffs any sum but on the contrary plaintiffs were indebted to it for certain merchandise sold and delivered for \$86.52, which was due and unpaid and that complainants be decreed to pay. The case was heard before the chancellor and a decree entered against defendant for \$6,949.89. Defendant appeals and plaintiffs file a cross-appeal by which they claim that the court should have allowed interest on the amount found due from defendant from March 27, 1943 to March 22, 1945, the day the decree was entered.

Counsel for defendant in their brief admit that under the evidence defendant was indebted to plaintiffs for \$1,234.09 and

R. S. SCHENKMAN and ROBERT A. YOUNG, Co-partners, Trading as Schenckman-Young Sales Company, Appellees,

v.

ROYAL CORPORATION, a Corporation, Appellant.

APPEAL FROM
SIXTH CIRCUIT
COURT OF TEXAS

32814322

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed their complaint in chancery against defendant alleging that on June 18, 1941, they entered into a written agreement with defendant whereby they were to be the sales' representatives of defendant in the states of Texas, Oklahoma, Arkansas and Louisiana; that they performed services and that under the terms of the contract they were entitled to commissions some of which, aggregating \$1,010.51, had not been paid. They prayed for an accounting and a decree for the amount found to be due.

Defendant denied that it owed plaintiffs any sum but on the contrary plaintiffs were indebted to it for certain merchandise sold and delivered for \$88.52, which was due and unpaid and that complaints be decreed to pay. The case was heard before the chancellor and a decree entered against defendant for \$8,949.93. Defendant appeals and plaintiffs file a cross-appeal by which they claim that the court should have allowed interest on the amount found due from defendant from March 27, 1942 to March 27, 1945, the day the decree was entered. Counsel for defendant in their brief admit that under the evidence defendant was indebted to plaintiffs for \$1,534.08 and

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that the court erred in entering a decree for more than that sum.

The record discloses that plaintiffs are co-partners, trading as Schermerhorn & Young Sales Company, having their place of business at Ft. Worth, Texas. That Schermerhorn lives in Dallas and Young in Ft. Worth, Texas; that they are agents for a number of companies in some of our southwestern states and have been in business since 1939, doing business principally by selling supplies to retail companies in that vicinity. Defendant, Relyan Corporation, is an Illinois corporation with its principal place of business in Chicago. E. M. Naylor, president of the defendant company, has been connected with the oil business since 1928; that before the date of the contract, entered into between the parties June 13, 1941, it sold its own repair plugs and mechanical rivets in Texas, Arkansas, Louisiana and Oklahoma; that in 1938 defendant began to push the sale of its repair plugs by advertising and direct mail literature to the oil industry and had obtained a number of customers in the oil region.

June 13, 1941, the parties entered into the written contract which is the basis of this suit. It was prepared by defendant and provides: "Commission Set-up -- Multi-Seal Repair Plugs Jobber Sales

"On sales of Multi-Seal Repair Plugs to jobbers, we will pay you 15%

"Consumers Sales

"On sales of Multi-Seal Repair Plugs to consumers, we will pay you 30% ***

"Commission Set-up -- Relyan Mechanical Rivets

"Relyan Mechanical Rivets are, for the most part, sold directly to the consumers, we have no jobber set-up on them." And that the selling price varied according to the quantity sold ranging from 25% to 10%.

The contract continues: "You have asked for the States of

that the court erred in entering a decree for more than that sum.

The record discloses that plaintiffs are co-partners,

trading as Bohrerhorn & Young Sales Company, having their

place of business at Ft. Worth, Texas. That Bohrerhorn lives

in Dallas and Young in Ft. Worth, Texas; that they are agents

for a number of companies in some of our southwestern states and

have been in business since 1928, doing business principally by

selling supplies to retail companies in that vicinity. Defendant,

Polyan Corporation, is an Illinois corporation with its principal

place of business in Chicago. E. M. Taylor, president of the

defendant company, has been connected with the oil business since

1928; that before the date of the contract, entered into between

the parties June 12, 1941, it sold its own repair plugs and

mechanical rivets in Texas, Arkansas, Louisiana and Oklahoma;

that in 1938 defendant began to push the sale of its repair plugs

by advertising and direct mail literature to the oil industry

and had obtained a number of customers in the oil region.

June 12, 1941, the parties entered into the written con-

tract which is the basis of this suit. It was prepared by defen-

dant and provides: "Competition Set-up — Multi-Seal Repair Plugs

Job or Sales

"On sales of Multi-Seal Repair Plugs to Jobbers, we will pay

you 15%

"Consumers Sales

"On sales of Multi-Seal Repair Plugs to consumers, we will pay

you 20% ***

"Competition Set-up — Polyan Mechanical Rivets

"Polyan Mechanical Rivets are, for the most part, sold directly

to the consumers, we have no jobber set-up on them." And that the

selling price varied according to the quantity sold ranging from

25¢ to 10¢.

The contract continues: "You have asked for the States of

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Texas, Oklahoma, Arkansas and Louisiana. If you are really covering all four States, we will gladly assign them to you, with the understanding, however, that if it develops that you are not in position to really cover all this territory, we are to have the privilege of withdrawing any part of it, which we feel is not being properly covered by you.

"Effective immediately, we will start sending you copies of all invoices covering direct sales of *** Plugs and *** Rivets to both jobbers and consumers, allowing you the full commission on them. We will also give you a brief memorandum on the direct accounts we have in your territory just as rapidly as we can, so that you will have the background on each individual account;" that defendant would send commission checks as near as possible on the 10th of each month covering shipments made the previous month.

"This sales agreement is to stand until cancelled in writing with the understanding that either party is to have the privilege of cancelling on thirty days notice."

Upon the execution of the contract the parties began to operate under it. The orders which plaintiffs obtained were sent to defendant, others came direct to defendant and both parties agree that plaintiffs were entitled to commissions on all of the sales until March 12, 1943 being 30 days after February 10, 1943, when defendant wrote plaintiffs a letter advising them that it had appointed John G. Owen sales manager, "in charge of repair plugs and mechanical rivet sales and have instructed him to institute a much more intensive campaign for repair plugs and mechanical rivet business." And the letter continues: "In order to clear the decks and give him [Owen] a free hand in working out his sales plan and lining up his distributors, we are cancelling all of the old sales agreements.

"This letter, therefore, is to notify you of the cancellation of our sales' agreement with you dated June 13, 1941, in accordance

Texas, Oklahoma, Arkansas and Louisiana. If you are really covering all four states, we will gladly assign them to you, with the understanding, however, that if it develops that you are not in position to really cover all this territory, we are to have the privilege of withdrawing any part of it, which we feel is not being properly covered by you.

"Effective immediately, we will start sending you copies of all invoices covering direct sales of *** Plugs and *** Rivets to both jobbers and consumers, allowing you the full commission on them. We will also give you a brief memorandum on the direct accounts we have in your territory just as rapidly as we can, so that you will have the background on each individual account;" that defendant would send commission checks as soon as possible on the 10th of each month covering shipments made the previous month.

"This sales agreement is to stand until cancelled in writing with the understanding that either party is to have the privilege of cancelling on thirty days notice."

Upon the execution of the contract the parties began to operate under it. The orders which plaintiffs obtained were sent to defendant, others came direct to defendant and both parties agree that plaintiffs were entitled to commissions on all of the sales until March 18, 1943 being 30 days after February 10, 1943, when defendant wrote plaintiffs a letter advising them that it had appointed John C. Owen as sales manager, "in charge of repair plugs and mechanical rivet sales and have instructed him to institute a much more intensive campaign for repair plugs and mechanical rivet business." And the letter continues: "In order to clear the decks and give him [Owen] a free hand in working out his sales plan and lining up his distributors, we are cancelling all of the old sales agreements."

"This letter, therefore, is to notify you of the cancellation of our sales' agreement with you dated June 13, 1941, in accordance

with the terms thereof." That Mr. Owen would call on plaintiffs at the first opportunity in working out some modified form of the agreement to cover whatever territory plaintiffs and Owen might "decide you can effectively and intensavely handle for us. The final decision on this matter will, however, have to rest with Mr. Owen.

"Pending his visit with you we will be very glad to continue to pay you commissions on all orders which you send us; or which customers which you have established for us, send us direct. Personally I greatly appreciate the friendly cooperative fashion in which you have always tried to work with our little company, and look forward to doing business" with plaintiffs for a long time to come.

Eight days later, on February 18, plaintiffs wrote defendant a letter in reply to the letter of February 10, in which they said: "It was a pleasure to receive the letter from you. You advise us appointment of Mr. John C. Owen as a new Sales Manager, 'to institute a much more intensive campaign for Rolyan Multi-Seal Repair Plugs.' Whatever is best for the Rolyan Corporation we are sure will be best for the Schermerhorn-Young Sales Co. We welcome Mr. Owen. We hope everything works out fine for all the Rolyan Corporation, Mr. Owen and the Schermerhorn-Young Sales Co. - for - as Rolyan Corporation goes, we all go - and may it be - Fine Going - of Rolyan Products.

"It was interesting that we all were of one mind, in that we had just concluded the program of a mailing campaign of over three thousand. We ordered a small stock of Rolyan Products in, to ourselves for immediate rush consumption, and much of the literature was out and the remainder ready waiting additional literature of Rolyan products when your letter came. ***

"We hope to soon have the pleasure of personally meeting Mr.

with the terms thereof." That Mr. Owen would call on Plaintiff at the first opportunity in working out some modified form of the agreement to cover whatever territory Plaintiff and Owen might "decide you can effectively and advantageously handle for us. The final decision on this matter will, however, have to rest with Mr. Owen."

"Pending his visit with you we will be very glad to continue to pay you commissions on all orders which you send us; on which customers which you have established for us, send us direct. Personally I greatly appreciate the friendly cooperative relation in which you have always tried to work with our little company, and look forward to doing business with Plaintiff for a long time to come."

Night days later, on February 18, Plaintiff wrote defendant a letter in reply to the letter of February 10, in which they said: "It was a pleasure to receive the letter from you. You advise us a pointment of Mr. John C. Owen as a new Sales Manager, 'to institute a much more intensive campaign for Polyan Multi-Seal Repair Plugs.' Whatever is best for the Polyan Corporation we are sure will be best for the Schenckhorn-Young Sales Co. We welcome Mr. Owen. We hope everything will turn out fine for all the Polyan Corporation, Mr. Owen and the Schenckhorn-Young Sales Co. - for - as Polyan Corporation sees, we all go - and may it be - fine going - of Polyan Products."

"It was interesting that as all were of one mind, in that we had just concluded the program of a mailing campaign of over three thousand. We ordered a small stock of Polyan Products in to ourselves for immediate cash consumption, and much of the literature was out and the remainder ready sitting additional literature of Polyan products when your letter came. We hope to soon have the pleasure of personally meeting Mr."

5.

Owen and to have things worked out to our mutual benefit."

March 22, 1943, Rolyan Corporation, by Owen, its sales manager, wrote plaintiffs a letter in which it was said: "We note with pleasure your mail campaign on Multi-Seal Repair Plugs. We are likewise pleased to note your statement concerning the favorable returns." Then follow other matters and the letter continues: "It has been my intention to contact you with a view to setting up a new working arrangement on Multi-Seal Repair Plugs." But on account of press of business and Mr. Naylor's illness, he was unable to do so. "Since I believe it is our mutual desire to sell direct to large industrial users and, secondly, to line up resellers, we would like to have you give some thought in the direction of the type of resale houses which you might establish within an area that you intensively cover. ***

"Since the cancellation of your former working agreement we have only received one small order from a mill supply house in your vicinity. There is an intimation in your letter that you believe that much business might be forthcoming from your area of operation direct into our office and we presume you would like to gain compensation for the activity that you are putting forth. We likewise agree with you that you are entitled to this reward but the working out of an arrangement naturally depends upon the area that you cover intensively."

March 26, 1943, four days after the letter last quoted from, defendant wrote plaintiffs another letter in which it was stated: "A letter has just been received from the Maloney Tank Manufacturing Company in which they relate that your Mr. Robert A. Young called on them on March 24th (the date of their letter). They state that they were quoted by Mr. Young our list prices less a discount of 35% on the 1/2" diameter Multi-Seal Repair Plugs. Mr. Young further indicated, according to their letter, that

Owen and to have things worked out to our mutual benefit."

March 22, 1943, Noyan Corporation, by Owen, its sales

manager, wrote plaintiffs a letter in which it was said: "We

note with pleasure your self-composition on Anti-Seal Repairs.

We are likewise pleased to note your statement concerning the

favorable returns." Then follow other matters and the letter

continues: "It has been my intention to come to you with a view

to setting up a new working arrangement on Anti-Seal Repair

Plugs." But on account of press of business and Mr. Noyan's

illness, he was unable to do so. "Since I believe it is our

mutual desire to self-align to large industrial users and, secondly,

to line up resellers, we would like to have you give some thought

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Manufacturing Company in which they relate that your Mr. Robert A.

Young called on them on March 24th (the date of their letter).

They state that they were quoted by Mr. Young our list prices less

a discount of 25% on the 1/2" diameter Anti-Seal Repair Plugs.

Mr. Young further indicated, according to their letter, that

6.

'list price applied only when Multi-Seal Repair Plugs were used by the purchaser, but when they were for resale and were purchased in large quantities the discount of 35% applied'.

"Since we had cancelled your working arrangement, your representative had no right to establish any new merchandising sales outlets for Multi-Seal Repair plugs. As a matter of fact, we have written you on numerous occasions asking for certain vital information concerning your methods of sales operation and area coverage which might have lead [led] to our setting up a reasonable working arrangement within an intensified area which you might handle, but this information has never been forthcoming.

"In our cancellation letter of February 10th we told you only that 'we will be glad to continue to pay you commissions on all orders which you sent to us; or to customers which you have established for us sent direct to us'.

"Further, as a matter of fact, Maloney Tank Manufacturing Company could not be classified as a jobber-resaler and therefore is not entitled to a jobbing discount as indicated on our yellow colored 'jobber's cost sheet'. ***

"Since we introduced and developed Multi-Seal Repair Plugs with this company we feel that the action taken by your representative in his contact of this company was entirely out of order and places us in an unwarranted, embarrassing position with our customer. We see no alternative but to discontinue all discounts to you on products of our manufacture effective as of the date of this letter. This letter will therefore serve as our notification of this action."

In the second amended complaint, on which the case went to trial, the accounts of a great many persons are named on which plaintiffs claim commissions, making a total of \$12,010.51, but in the briefs it is conceded that only the accounts of two of these customers are involved, namely, the Maloney Tank Company and Black,

'list price applied only when Multi-Seal Repair Rings were used by the purchaser, but when they were for resale and were purchased in large quantities the discount of 33% applied'.

"Since we have cancelled your working arrangement, your representative had no right to establish any new merchandising sales outlets for Multi-Seal Repair Rings. As a matter of fact, we have written you on numerous occasions asking for certain vital information concerning your methods of sales operation and area coverage which might have lead [led] to our setting up a reasonable working arrangement within an indefinite area which you might handle, but this information has never been forthcoming.

"In our cancellation letter of February 14th we told you only that 'we will be glad to continue to buy your commissions on all orders which you sent to us; or to customers which you have established for us sent direct to us'.

"Further, as a matter of fact, Maloney Tank Manufacturing Company could not be classified as a jobber-resaler and therefore is not entitled to a jobbing discount as indicated on our yellow colored 'Jobber's cost sheet'. ***

"Since we introduced and developed Multi-Seal Repair Rings with this company we feel that the action taken by your representative in his contact of this company was entirely out of order and places us in an unwarranted, embarrassing position with our customers. We see no alternative but to discontinue all discounts to you on products of our manufacture effective as of the date of this letter. This letter will therefore serve as our notification of this action."

In the second amended complaint, on which the case went to trial, the accounts of a great many persons are named on which plaintiffs claim commissions, totaling a total of \$12,010.31, but in the briefs it is conceded that only the accounts of two of these customers are involved, namely, the Maloney Tank Company and Black,

7.

Sivalls & Bryson.

Plaintiffs' theory, as stated by their counsel is that:

"Under plaintiffs' original contract of employment [June 13, 1941] with the defendant, plaintiffs were entitled to receive a commission of 15% on all such 'jobber accounts,' and a commission of 30% on all such 'consumer' accounts, originating from the plaintiffs' territory up to March 12, 1943, the date of the conditional termination of the contract.

"Thereafter from March 12, 1943, to and including March 27, 1943, the plaintiffs continued as defendant's sales representatives on the basis of the terms of defendant's letter of February 10, 1943, as interpreted and expanded by their subsequent letters to the plaintiffs, and more particularly by defendant's letter of March 22, 1943. On that basis, the tank company orders, to-wit, Maloney Tank Co. and Black, Sivalls & Bryson- received by the defendant between March 12, 1943 and March 27, 1943, were 'consumer' accounts established by the plaintiffs, and plaintiffs were entitled to a commission of 30% on those orders.

"Plaintiffs not only established the Maloney Tank Co. and Black, Sivalls & Bryson accounts, within the spirit and letter of the contract of employment with the defendant, but defendant is estopped from controverting that claim by its own written admission of March 22, 1943."

On the other hand defendant's theory of the case, as stated by its counsel is: "that it terminated the original agreement [of June 13, 1941] on March 12, 1943 by a letter dated February 10, 1943; that this letter created a new agreement whereby plaintiffs were thereafter entitled to commissions only upon orders obtained by them or sent in directly by customers which had been established by them; that the Maloney Tank Company and the Black, Sivalls & Bryson accounts were not established by the plaintiffs; that this new arrangement was terminated by defendant on March 27, 1943; and that plaintiffs were entitled to no commissions thereafter.

Sivalls & Bryson.

Plaintiffs' theory, as stated by their counsel is that:

"Under plaintiffs' original contract of employment [June 12, 1941]

with the defendant, plaintiffs were entitled to receive a

commission of 15% on all such 'jobber accounts', and a commission

of 30% on all such 'consumer' accounts, originating from the

plaintiffs' territory up to March 27, 1943, the date of the con-

ditional termination of the contract.

"Thereafter from March 1, 1943, to and including March

27, 1943, the plaintiffs continued as defendant's sales representa-

tives on the basis of the terms of defendant's letter of February

10, 1943, as interpreted and amended by their subsequent letters

to the plaintiffs, and more particularly by defendant's letter of

March 22, 1943. On that basis, the tank company orders, to-wit,

Maloney Tank Co. and Black, Sivalls & Bryson - received by the

defendant between March 12, 1943 and March 27, 1943, were 'consumer'

accounts established by the plaintiffs, and plaintiffs were entitled

to a commission of 30% on these orders.

"Plaintiffs not only established the Maloney Tank Co. and

Black, Sivalls & Bryson accounts, within the spirit and letter

of the contract of employment with the defendant, but defendant

is estopped from controverting that claim by its own written

admission of March 22, 1943."

On the other hand defendant's theory of the case, as stated

by its counsel is: "that it terminated the original agreement

[of June 12, 1941] on March 12, 1943 by a letter dated February

10, 1943; that this letter created a new agreement whereby plaintiffs

were thereafter entitled to commission only upon orders obtained

by them or sent in directly by customers which had been established

by them; that the Maloney Tank Company and the Black, Sivalls &

Bryson accounts were not established by the plaintiffs; that this

new arrangement was terminated by defendant on March 27, 1943; and

that plaintiffs were entitled to no commission thereafter.

8.

"Defendant also contends that the 'tank companies' were not consumers withingthe meaning of the employment agreement, but were jobbers, and that plaintiffs' commission on their orders should therefore have been only 15 per cent."

We hold that the contract of June 13, 1941, was perminated by defendant March 12, 1943, which was 30 days after defendant wrote plaintiffs on February 10, 1943, that it was cancelling the contract. Under the contract plaintiffs were entitled to a commission on all sales of plugs sold by defendant in the four states covered by the contract, whether the orders were obtained by plaintiffs or not. If the plugs were sold to jobbers, plaintiffs' commission was 15% and if sold to consumers, 30%. After March 12, however, plaintiffs were to receive commissions only on all orders which plaintiffs sent to defendant or to customers who sent their orders direct to defendant which customers plaintiffs had obtained. And the arrangement which terminated March 12, 1943, was cancelled by the letter which defendant wrote plaintiffs March 26, 1943.

The two questions for decision are: (1) Were the defendant's sales to the two tank companies, Maloney Tank Company and Black, Sivalls & Bryson, "consumer sales" within the meaning of the contract of June 13, 1941, and (2) Were these sales made or "established" by plaintiffs? If the sales to the two tank companies were "consumer sales" within the meaning of the contract and the orders were obtained by plaintiffs from the two tank companies, plaintiffs would be entitled to 30% provided they also "established" or secured these two sales.

The evidence shows that the two tank companies were engaged in manufacturing and selling tanks, and the two tank company accounts involved were sales of tanks made by the tank companies to the United States Government. There is evidence to the effect that the Navy Department had made some tests of defendant's plugs and after Pearl Harbor defendant again took up personally, with

"Defendant also contends that the 'tank companies' were not consumers within the meaning of the employment agreement, but were jobbers, and that plaintiffs' commission on their orders should therefore have been only 15 per cent."

We hold that the contract of June 12, 1941, was governed by defendant March 12, 1943, which was 30 days after defendant wrote plaintiffs on February 10, 1943, that it was cancelling the contract. Under the contract plaintiffs were entitled to a commission on all sales of pipes sold by defendant in the four states covered by the contract, whether the orders were obtained by plaintiffs or not. If the pipes were sold to jobbers, plaintiffs' commission was 15% and if sold to consumers, 30%. After March 12, however, plaintiffs were to receive commissions only on all orders which plaintiffs sent to defendant or to customers who sent their orders direct to defendant which custom plaintiffs had obtained. And the arrangement which terminated March 12, 1943, was cancelled by the letter which defendant wrote plaintiffs March 2, 1943.

The two questions for decision are: (1) Were the defendant's sales to the two tank companies, Meloney Tank Company and Black, Sivalls & Bryson, "consumer sales" within the meaning of the contract of June 12, 1941, and (2) Were these sales made or "established" by plaintiffs? If the sales to the two tank companies were "consumer sales" within the meaning of the contract and the orders were obtained by plaintiffs from the two tank companies, plaintiffs would be entitled to 30% provided they also "established" or secured these two sales.

The evidence shows that the two tank companies were engaged in manufacturing and selling tanks, and the two companies accounts involved were sales of tanks made by the tank companies to the United States Government. There is evidence to the effect that the Navy Department had made some tests of defendant's tanks and after Pearl Harbor defendant again took up personally, with

9.

the Navy Department the question of using defendant's plugs. And since defendant's plugs could be inserted from the outside of the tank without draining its contents and if holes were shot in the tanks they could be easily plugged, the Government approved the use of the plugs which they named "patch bolts." At first the Government purchased directly from defendant some of the bolts for use with the tanks it had previously purchased; later the Government provided in its specifications that with each tank there should be furnished one or more sets of tools, each to include 24 patch bolts. The tanks would be made and sold by the two tank companies, together with some of the bolts, to the United States Government and the Government would use the bolts in case the tanks leaked. Under this state of facts we think it clear that neither of the tank companies can be said to be a consumer of the plugs - the Government was the consumer, and therefore the plaintiffs, under the contract, were not entitled to more than 15% provided they established or obtained the orders. We think the trial court erred in holding that the sales to the two tank companies were consumer sales. Bradley Supply Co. v. Ames, 359 Ill. 162; American Optical Co. v. Nudelman, 370 Ill. 627; Revzan v. Nudelman, 370 Ill. 180. And this conclusion is not affected, as counsel for plaintiffs contend, by the testimony of Doris E. Eklund, who was called by plaintiffs. She testified that she was former secretary and co-manager of the defendant Company until 1942; that where a customer of defendant did not receive a discount it was a "consumer" and plaintiffs were entitled to a commission of 30%, that if there was a discount, the customer was classified as a "jobber" and plaintiff entitled to a commission of 15% and that this was the practice defendant followed in billing purchasers. There is other evidence to the effect that Mr. Naylor, president of the defendant company, knew the customers and whether they were buying for their own use or to repair their own equipment for resale, and based on this knowledge, he classified the accounts.

the Navy Department the question of using defendant's plans. And since defendant's plans could be inserted from the outside of the tank without draining its contents and if holes were shot in the tanks they could be easily plugged, the Government approved the use of the plans which they named "patch bolts". At first the Government purchased directly from defendant some of the bolts for use with the tanks it had previously purchased; later the Government provided in its specifications that with each tank there should be furnished one or more sets of tools, each to include 24 patch bolts. The tanks would be made and sold by the two tank companies, together with some of the bolts, to the United States Government and the Government could use the bolts in case the tank leaked. Under this state of facts we think it clear that neither of the tank companies can be said to be a consumer of the plans - the Government was the consumer, and therefore the plaintiff, under the contract, were not entitled to more than 15% provided they established or obtained the order. We think the trial court erred in holding that the sales to the two tank companies were consumer sales. Brady Supply Co. v. A. S. 358 Ill. 182; American Optical Co. v. Washington, 370 Ill. 627; Revan v. Nuttall, 370 Ill. 180. And this conclusion is not affected as counsel for plaintiff contend, by the testimony of Doris Eklund, who was called by plaintiff. She testified that she was former secretary and co-manager of the defendant company until 1942; that there a customer of defendant did not receive a discount it was a "consumer" and plaintiff were entitled to a commission of 30%, that if there was a discount, the customer was classified as a "jobber" and plaintiff entitled to a commission of 15% and that this was the practice defendant followed in billing purchasers. There is other evidence to the effect that Mr. Taylor, president of the defendant company, knew the customers and whether they were buying for their own use or to repair their own equipment for resale, and by reason this knowledge, he classified the accounts.

10.

We think this evidence does not justify the conclusion that the contract between the parties of June, 1941, should be construed to mean that the two tank companies were consumers of the patch bolts.

(2) Were the sales to the tank companies involved in the instant case "established" or secured by plaintiffs? Between March 12 and March 17, 1943, defendant received direct from the Maloney Tank Company orders amounting to \$4,484.40, and from Black, Sivals & Bryson, \$10,296. The trial court found that these two customers had been established by plaintiffs and allowed them a commission of 30%. We hold this was error.

One of the plaintiffs, Mr. Young, testified that in July or August, 1942, he called at the Maloney Tank Company office at Odessa, Texas, and about the same time, called on Mr. Highfill, its purchasing agent, at its main office in Tulsa, Oklahoma, and the latter gave him his card; that the next time he called on Mr. Highfill was just before plaintiffs had received defendant's letter of March 26, 1943, at which time, Mr. Highfill "threw the invoices out on the desk" and showed all he had purchased direct from defendant. That the first time he called on the Maloney Tank Company was about 6 months before the tank company bought any of the plugs; that the next time he called on the tank company was in March, 1943.

Defendant took the deposition of Mr. Highfill, the purchasing agent for the Maloney Tank Company. He testified that he received a letter from defendant dated February 6, 1943, stating that defendant had patch bolts specified in Government tanks for sale, and soliciting the Maloney Tank Company business. That two days later, February 8, he telephoned defendant in Chicago and sent it a written order by mail on the same day, for some of the plugs. Under these facts we think it appears that plaintiffs first attempted to secure an order from the Maloney Company about July, 1942, but were unsuccessful and they did nothing further until

to think this evidence does not justify the conclusion that the contract between the parties of June, 1943, should be construed to mean that the two tank companies were co-conspirators of the pattern.

(2) Were the sales to the tank companies involved in the instant case "established" or secured by plaintiff? Between March 12 and March 17, 1943, defendant received direct from the Maloney Tank Company orders amounting to \$4,434.40, and from Jack Sivalia & Bryson, 10, 1943. The trial court found that these two customers had been established by plaintiff and allowed them a commission of 30%. We hold this was error.

One of the plaintiffs, Mr. Brown, testified that in July

or August, 1943, he called at the Maloney Tank Company office at Odessa, Texas, and about the same time, called on Mr. Higginell, its purchasing agent, at its main office in Tulsa, Oklahoma, and the latter gave him his card; that the next time he called on Mr. Higginell as just before plaintiff had received defendant's letter of March 26, 1943, at which time, Mr. Higginell "threw the invoices out on the desk" and showed all he had purchased direct from defendant. That the first time he called on the Maloney Tank Company was about 6 months before the tank company bought any of the pigs; that the next time he called on the tank company was in March, 1943.

Defendant took the deposition of Mr. Higginell, the purchasing agent for the Maloney Tank Company. He testified that he received a letter from defendant dated February 6, 1943, stating that defendant had been told by plaintiff in government tanks for sale, and soliciting the Maloney Tank Company business. That two days later, February 6, he telephoned defendant in Chicago and sent it a written order by mail on the same day, for some of the pigs.

Under these facts we think it appears that plaintiff first attempted to secure an order from the Maloney Company about July 1943, but was unsuccessful and they did nothing further until

11.

after the account had been secured by defendant.

As to the claim that plaintiffs established or obtained the account of Black, Sivalis & Bryson, Mr. Young testified that he called at their branch office at Graham, Texas and showed their representative the plugs. That "when I first called on them, they had no need for plugs. After we found out that they did not use any plugs we did not call on them as we did on the supply stores." That between June 13, 1941, and the end of March 1943, he called on some of the branches of the Black, Sivalis & Bryson Company at their offices in Kansas City but not at their principal office in Oklahoma City. That before February, 1943, the only tank company he knew which used any patch bolts was the Lincoln Company, which company bought them from the Mid-Continental Supply; "and then they got a few at Graham, Texas, for Black, Sivalis & Bryson. Until February 1943, when they obtained Government contracts for the sale of tanks, the tank companies had no use for patch bolts."

Mrs. Eklund testified that Black, Sivalis & Bryson purchased patch bolts from defendant for their own use on their own tanks before the summer of 1942 while she was with defendant company; that in 1937 defendant received a small order for a dozen plugs from the Black, Sivalis & Bryson Company; that shortly afterward that company sent in another order for 2 gross of plugs which defendant filled.

As above stated, Mr. Naylor, president of the defendant company since 1928, had been doing business with the oil companies in the four states covered by plaintiffs' contract and had obtained a number of customers through advertising, before the contract was made and he named 20 concerns with which they did business before June, 1941, among which were the Maloney Tank Company and Black, Sivalis & Bryson Company, to which defendant sold plugs as early as 1939. The evidence is further to the effect that in 1942 and 1943, defendant received direct mail orders from the Black

after the account had been secured by defendant.

As to the claim that plaintiff established or obtained the account of Black, Sivalls & Bryson, Mr. Young testified that he called at their branch office at Graham, Texas and showed their representative the plugs. That "when I first called on them, they had no need for plugs. After we found out that they did not use any plugs we did not call on them as we did on the supply stores." That between June 13, 1941, and the end of March 1943, he called on some of the branches of the Black, Sivalls & Bryson Company at their offices in Kansas City but not at their principal office in Oklahoma City. That before February, 1943, the only tank company he knew which used any patch bolts was the Lincoln Company, which company bought them from the Mid-Continental Supply; "and then they got a few at Graham, Texas, for Black, Sivalls & Bryson. Until February 1943, when they obtained Government contracts for the sale of tanks, the tank companies had no use for patch bolts." Mrs. Eklund testified that Black, Sivalls & Bryson purchased patch bolts from defendant for their own use on their own tanks before the summer of 1942 while she was with defendant company; that in 1937 defendant received a small order for a dozen plugs from the Black, Sivalls & Bryson Company; that shortly afterward that company sent in another order for 2 gross of plugs which defendant filled. As above stated, Mr. Taylor, president of the defendant company since 1938, had been doing business with the oil companies in the four states covered by plaintiff's contract and had obtained a number of customers through advertising, before the contract was made and he started to connect with which they did business before June, 1941, among which were the Honey Tank Company and Black, Sivalls & Bryson Company, to which defendant sold plugs as early as 1939. The evidence is further to the effect that in 1942 and 1943, defendant received direct mail orders from the Black

12.

Sivalls & Bryson Company for patch plugs in connection with Government tank contracts through its own solicitation. There is other evidence in the record to the same effect. Upon a consideration of all the evidence, we are of opinion that the orders for plugs of the Black, Sivalls & Bryson Company were obtained by defendant and therefore plaintiffs were not entitled to any commissions after March 12, 1943. Prior to March 12, 1943 the evidence shows that there was due plaintiffs \$1,234.09, which amount defendant concedes is due and unpaid.

Plaintiffs in their cross-appeal contend that they were entitled to interest from March 27, 1943 to March 22, 1945, the date of the entry of the decree, by virtue of Section 2, chapter 74, Ill. Rev. Stats. 1945, which provides that creditors shall be allowed to receive 5% per annum for all moneys after they become due on any instrument in writing or money due on the settlement of account from the date of liquidating accounts between the parties and ascertaining the balance, and a number of cases are cited. But we think this contention cannot be sustained. This is a suit in equity and "In equity, interest is allowed because of equitable circumstances, and is given or withheld as, under all the circumstances of the case, seems just and equitable. Golden v. Cervenka, 278 Ill. 409." Cohen v. North Ave. State Bank, 291 Ill. App. 558; see also People v. Farmers' State Bank, 371 Ill. 222.

The decree of the Superior court of Cook county is reversed and the cause remanded with directions to enter a decree in plaintiffs' favor and against defendant for \$1,234.09.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and Niemeyer, J., concur.

43495

REBA CAMPBELL,
Appellant,

v.

LEO R. CAMPBELL,
Appellee.

186 A
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

328 I.A. 322²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

June 21, 1940, a decree of divorce was entered in plaintiff's favor against defendant finding him guilty of extreme and repeated cruelty. Three children were born of the marriage, two of them were adults at the time of the trial. Plaintiff was awarded the custody of the minor child and it was decreed that defendant pay plaintiff \$140 a month in semi-monthly payments for the support of herself and the minor son. December 28, 1942, plaintiff filed her sworn petition asking that the alimony be increased to \$500 a month for her and her minor son's support and maintenance. February 16, 1943, an order was entered referring the matter to a special commissioner to take the testimony and report as to the earnings of defendant, etc. The commissioner filed his report December 18, 1944. March 5, 1945, an order was entered increasing the allowance to \$200 per month for plaintiff, the allowance for the support and maintenance of the minor son (he being in the Navy) was suspended until the further order of court. Plaintiff being dissatisfied with the amount of the allowance, prosecutes this appeal. The reply brief was not filed in this court until January 17, 1946.

The record discloses that the parties were married in 1914 and lived together as husband and wife until 1940, a period of 26 years.

REGA CAMPBELL, Appellant,
vs.
LEO R. CAMPBELL, Appellee.

APPEAL FROM
CIRCUIT COURT,
CUM GRANT.

3281A.332

MR. JUSTICE O'DONOVAN DELIVERED THE OPINION OF THE COURT.

June 21, 1940, a decree of divorce was entered in plaintiff's favor against defendant finding him guilty of extreme and repeated cruelty. Three children were born of the marriage, two of them were adults at the time of the trial. Plaintiff was awarded the custody of the minor child and it was decreed that defendant pay plaintiff \$140 a month in semi-monthly payments for the support of herself and the minor son. December 26, 1942, plaintiff filed her second petition asking that the alimony be increased to \$200 a month for her and her minor son's support and maintenance. February 16, 1943, an order was entered referring the matter to a medical commission to take the testimony and report as to the earnings of defendant, etc. The commission filed its report December 1, 1943. March 5, 1945, an order was entered increasing the alimony to \$200 per month for plaintiff, the allowance for the support and maintenance of the minor son (he being in the Navy) was suspended until the further order of the court. Plaintiff being dissatisfied with the amount of the allowance, prosecutes this appeal. The reply brief was not filed in this court until January 15, 1946.

The record discloses that the parties were married in 1914 and lived together as husband and wife until 1940, a period of 26 years.

2.

The decree recites that the parties agreed in open court to a property settlement which was incorporated in the decree and the amount allowed plaintiff for the support of herself and minor child was based on the representation made by defendant in open court that his income from all sources was \$6,500 a year. In addition to the allowance of \$140 per month, defendant was ordered to pay costs and expenses incidental to the education of the minor son, including completion of high school. And it was further decreed that defendant execute a quit claim deed conveying his interest in two pieces of real estate to plaintiff; that one of the parcels of real estate on which the parties maintained their home in Winnetka, was subject to a mortgage of \$9,000 and that defendant pay this indebtedness within 10 years; that he pay taxes levied against the premises and expend \$1,000 within 60 days for repairing them; that defendant take out insurance on his life for not less than \$14,000 so that the proceeds of the policy, in case he died, should be applied to the payment of the mortgage of \$9,000 and unpaid taxes, and to assure the education of the minor child, the policy to be delivered to plaintiff and to remain in her custody until the obligations were discharged in full, at which time it was to be returned to defendant. Defendant was also required to pay some other matters.

Defendant, called as an adverse witness, testified that he remarried in 1942 and resided with this wife in Oak Park; that he was vice-president, sales manager, chief engineer and chief estimator of the Campbell-Lowrie-Lautermilch Corporation which was incorporated in 1933. The evidence further shows that defendant's income for 1942 was \$25,060; for 1943, \$25,070 and since the year 1944 had not expired at the time of the hearing, his income for 1944 does not appear.

The decree recites that the parties agreed in open court to a property settlement which was incorporated in the decree and the amount allowed plaintiff for the support of herself and minor child was based on the representation made by defendant in open court that his income from all sources was \$6,500 a year. In addition to the allowance of \$140 per month defendant was ordered to pay costs and expenses incidental to the education of the minor son, including completion of high school. And it was further decreed that defendant execute a quit claim deed conveying his late wife's two pieces of real estate to plaintiff; that one of the parcels of real estate on which the parties maintained their home in Detroit, was subject to a mortgage of \$4,000 and that defendant pay this indebtedness within 10 years; that he pay taxes levied against the premises and expend \$1,000 within 60 days for repairing them; that defendant take out insurance on his life for not less than \$14,000 so that the proceeds of the policy, in case he died, should be applied to the payment of the mortgage of \$2,000 and unpaid taxes, and to secure the education of the minor child, the policy to be delivered to plaintiff and to remain in her custody until the obligations were discharged in full, at which time it was to be returned to defendant. Defendant was also required to pay some other matters.

Defendant, called as an adverse witness, testified that he remarried in 1942 and resided with his wife in Oak Park; that he was vice-president, sales manager, chief engineer and chief estimator of the Campbell-Lewis-Lawrence Corporation which was incorporated in 1937. The evidence further shows that defendant's income for 1942 was \$25,000; for 1943, \$22,070 and since the year 1944 had not expired at the time of the hearing, his income for 1944 does not appear.

3.

The book value of defendant's stock in the Campbell-Lowrie-Lautermilch Corporation was \$38,372.40.

On the hearing before the court it was stipulated by the parties that from the income tax returns made by defendant and produced by him for the year 1942, defendant's salary and bonus from Campbell-Lowrie-Lautermilch was \$23,800, from which, company expenses of \$1,077.09 were deducted, leaving a net of \$21,922.91 received from the company and \$1,260 for dividends on investments, making his total income subject to tax and before deductions \$23,182.91, from which the following deductions were made: contributions, \$510; interest payment, \$258.23; taxes, \$527.86; bad debts, \$269.00; other deductions, \$1,860, of which \$1,680 was alimony; total deductions, \$3,445.09, leaving a net income, before deducting income tax, \$19,737.82. The income tax was \$6,133.67 (after exemptions of \$1,200 and \$350) leaving a net income for 1942 of \$13,604.15. It was further stipulated that for the year 1943 (following the same method as above pointed out for the year 1942) defendant's net income was \$13,702.23. All of these figures for 1942 and 1943 appear from the income tax returns made by defendant.

Defendant testified that he was living with his present wife in Oak Park; that "My living expenses per year I would say is roughly \$10,000.00 a year, for me and my wife;" that in 1943 he spent about \$1,000 for a trip to Hot Springs; \$600 to Florida and about \$200 to Minocqua, Wisconsin. The evidence further shows that since the decree of divorce was entered defendant had paid off the \$9,000 mortgage in 1942, and is thereby relieved of paying interest on the amount due; that he is relieved of paying taxes on the homestead where plaintiff resides and which taxes must now be paid by her. In this connection the evidence is to the effect that since the decree was entered in 1940, she now has to pay taxes on the Winnetka home amounting to \$216;

The book value of defendant's stock in the Campbell-

Lowrie-Lauterbach Corporation as \$38,875.40.

On the hearing before the court it was stipulated by the

parties that from the income tax returns made by defendant

and produced by him for the year 1943, defendant's salary and

bonus from Campbell-Lowrie-Lauterbach was \$3,800, from which,

company expenses of \$1,077.09 were deducted, leaving a net of

\$2,722.91 received from the company and \$1,500 for dividends

on investments, making his total income subject to tax and

before deductions \$23,183.91, from which the following deductions

were made: contributions, \$510; interest payment, \$232.83;

taxes, \$257.88; bad debts, \$289.00; other deductions, \$1,880, of

which \$1,880 was alimony; total deductions, \$3,449.69, leaving

a net income, before deducting income tax, \$19,734.22. The

income tax was \$8,133.67 (after exemptions of \$1,800 and \$250)

leaving a net income for 1943 of \$11,600.55. It was further

stipulated that for the year 1943 (following the same method

as above pointed out for the year 1942) defendant's net income

was \$13,702.23. All of these figures for 1942 and 1943 were

from the income tax returns made by defendant.

Defendant testified that he was living with his present

wife in Oak Park; that "my living expenses per year I would say

is roughly \$10,000.00 a year, for me and my wife;" that in 1943

he spent about \$1,000 for a trip to Hot Springs; \$500 to Florida

and about \$200 to Wisconsin. The evidence further

shows that since the decree of divorce was entered defendant

had paid off the \$3,000 mortgage in 1942, and as a result relieved

of paying interest on the amount due; that he is relieved of

paying taxes on the homestead where plaintiff resides and which

taxes must now be paid by her. In this connection the evidence

is to the effect that since the decree was entered in 1940, she

now has to pay taxes on the innkeeper house amounting to \$210;

4.

special assessment, \$19.44; insurance, \$25.60, or a total of \$251.04 per year, which leaves her \$1428.96 of the alimony allowance of \$1,680. Plaintiff testified as to her living expenses per month, aggregating \$602, but some of these items were estimates and that since the decree was entered she had borrowed from Mrs. Keller \$3,000 at different times to pay taxes and to help defray other expenses, for which she gave notes.

The chancellor in deciding the case, in referring to plaintiff said: "the Court is very much impressed with the intelligence of this lady. *** When asked about her activities, social clubs, and so forth, she very frankly told the Court what they consisted of and what she had to pay. They were small in amount, but this man [defendant] has accustomed her to a situation in life, as is apparent, below which she should not live unless he cannot afford to maintain it. *** she is not obliged to live below that standard that he has accustomed her to, and it does not mean that because a man is divorced from a woman that the woman must shift for herself and live on a standard far below that which he is capable of maintaining for her." That both parties were graduated from the same college. "Now he is married since and he sets up in detail what it costs him to live, on an average. I think he put it at \$10,000.00 a year." That "Necessary expense he goes to in connection with the business of the Company is a legitimate charge against the gross income of the Company, so he does not have to have those expenses. *** If it costs him and his wife, second wife, \$10,000.00 a year to live, it is hardly becoming in him to say to his first wife, to whom he owes a first obligation, the second wife is a luxury, he cannot subordinate his duty to his first wife, by placing her obligations under the present wife, that he voluntarily entered into a luxury that he took unto himself, it is hardly becoming in him to say

special assessment, \$13.44; license, \$25.00, or a total of \$38.44 per year, which leaves her \$1438.06 of the alimony allowance of \$1,580. Plaintiff testified as to her living expenses per month, aggregating \$602, but some of these items were estimated and that since the decree was entered she had borrowed from Mrs. Keller \$3,000 at different times to pay taxes and to help defray other expenses, for which she gave notes.

The chancellor in deciding the case, in referring to plaintiff said: "The Court is very much impressed with the intelligence of this lady. *** When asked about her activities, social clubs, and so forth, she very frankly told the Court what they cost and what she had to pay. They were small in amount, but this man [defendant] has accustomed her to a situation in life, as is apparent, below which she should not live unless he cannot afford to maintain it. *** she is not obliged to live below that standard that he has accustomed her to, and it does not mean that because a man is divorced from a woman that the woman must shift for herself and live on a standard far below that which he is capable of maintaining for her." That both parties were graduated from the same college. "Now he is married since and he sets up in detail what it costs him to live, on an average. I think he put it at \$10,000.00 a year." That "Necessary expense he goes to in connection with the business of the company is a legitimate charge against the gross income of the company, so he does not have to have these expenses. *** If it costs him and his wife, second wife, \$10,000.00 a year to live, it is hardly becoming in him to say to his first wife, to whom he owes a first obligation, the second wife is a luxury, he cannot subordinate his duty to his first wife, by placing her obligations under the present wife, that he voluntarily entered into a luxury that he took unto himself, it is hardly becoming in him to say

5.

to that woman, having to maintain that home and to live even on a standard fifty per cent of what he had her accustomed to, even only fifty per cent is too much for her and that she must get along on \$1600.00 a year. Now, it just does not make sense. The parties circumstances have changed; even after all deductions for income tax."

Defendant contends that "Plaintiff is legally precluded because she is bound by her contract," as shown by the decree of divorce. There is no merit in this contention. The court had the power and it was its duty to modify the allowance for alimony and support if the evidence showed the conditions had changed since the decree was entered. Herrick v. Herrick, 319 Ill. 146; Cole v. Cole, 142 Ill. 19; Smith v. Smith, 334 Ill. 370-382. Defendant further contends that the court had no jurisdiction to modify the decree on the ground that by a change in the Federal law defendant was relieved from paying any tax on the alimony he paid, but imposed the burden of doing so on plaintiff, and in support of this Russell v. Russell, 142 Fed. 2d., 753, is cited. That case is not in point. The court there held that any decrease in the divorced wife's net income because of taxes or any other reason, which brings it below what is necessary for her situation in life may be considered in granting an increase in alimony but that increase must be based on an examination of the needs of the wife in the light of the present size of the divorced husband's income but not on the theory of an equitable tax adjustment.

Upon a consideration of the entire record, which shows that defendant's income has greatly increased and the amount paid plaintiff under the terms of the decree is insufficient to meet her living expenses, we think the allowance should have been \$250 per month.

to that woman, having to maintain that home and to live even on a standard fifty per cent of what he had her accustomed to, even only fifty per cent is too much for her and that she must get along on \$1800.00 a year. Now, it just does not make sense. The parties circumstances have changed; even after all deductions for income tax."

Defendant contends that "Plaintiff is legally precluded because she is bound by her contract," as shown by the decree of divorce. There is no merit in this contention. The court had the power and it was its duty to modify the allowance for alimony and support if the evidence showed the conditions had

changed since the decree was entered. Levin v. Harrison, 318 Ill. 148; Cole v. Cole, 148 Ill. 12; Smith v. Smith, 334 Ill. 370-382. Defendant further contends that the court had no

jurisdiction to modify the decree on the ground that by a change in the Federal law defendant was relieved from paying any tax on the alimony he paid, but imposed the burden of doing so on plaintiff, and in support of this Butteli v. Butteli, 148 Fed. 234, 758, is cited. That case is not in point. The court there held that any decree in the divorced wife's net income

because of taxes or any other reason, which arises it below what is necessary for her situation in life may be considered in granting an increase in alimony but that increase must be based on an examination of the needs of the wife in the light of the present size of the divorced husband's income but not on the theory of an equitable tax adjustment.

Upon a consideration of the entire record, which shows that defendant's income has greatly increased and the amount paid plaintiff under the terms of the decree is insufficient to meet her living expenses, we think the allowance should have been \$250 per month.

6.

For the reasons stated, the order of the Circuit court of Cook county is reversed and the matter remanded with directions to enter an order allowing plaintiff \$250 a month beginning March 1, 1945.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and Niemeyer, J., concur.

For the reasons stated, the order of the Circuit Court
of Cook County is reversed and the matter remanded with
directions to enter an order allowing plaintiff \$200 a month
beginning March 1, 1946.

REVERED AND REMANDED WITH DIRECTIONS.
MATCHETT, P. J., and NIEWIARSKI, J., concur.

43584

REBECCA SPRINGER,
Appellant,

v.

YELLOW CAB COMPANY, a Corporation,
Appellee.

1937 A
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

323 I.A. 354

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action for negligence, on trial by jury there was a verdict for plaintiff with damages of \$300.00. Plaintiff moved for a new trial. It was denied and judgment entered on the verdict, from which she appeals. Defendant did not move for a new trial. It does not argue error in the judgment and contends only that the amount thereof is adequate under the evidence. This is the controlling question in the case.

The occurrence complained of took place March 13, 1943. Plaintiff was riding with her son and daughter-in-law in one of defendant's cabs on Kedzie Avenue near Dickens in the City of Chicago, in a south direction and at great speed, when the driver suddenly applied the brakes, causing a violent jerk, which threw plaintiff against the sides of the cab and to its floor, injuring her. Plaintiff claims she became unconscious at the time but on that point the evidence is in conflict. She was taken to a hospital, where first aid was given. The cab driver then drove her to her home at 7033 North Glenwood Avenue, her son and daughter-in-law assisted her to the hospital and to her home.

The same evening Dr. Schechter was called. Plaintiff says she felt terrible pain down in the back and right up to the stomach. She had a headache; her mouth was bruised and bleeding. She wore a set of artificial teeth, both upper and lower plates,

43304

REBECCA SPRINGER,
Appellant,

v.

YELLOW CAB COMPANY, a Corporation,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

323 I.A. 374

MR. PRESIDING JUSTICE WATSON DELIVERED THE OPINION OF THE COURT.

In an action for negligence, on trial by jury there was a verdict for plaintiff with damages of \$300.00. Plaintiff moved for a new trial. It was denied and judgment entered on the verdict, from which she appeals. Defendant did not move for a new trial. It does not argue error in the judgment and contends only that the amount thereof is adequate under the evidence. This is the controlling question in the case.

The occurrence complained of took place March 18, 1943. Plaintiff was riding with her son and daughter-in-law in one of defendant's cabs on Kedzie Avenue near Dickens in the City of Chicago, in a south direction and at great speed, when the driver suddenly applied the brakes, causing a violent jerk, which threw plaintiff against the sides of the cab and to its floor, injuring her. Plaintiff claims she became unconscious at the time but on that point the evidence is in conflict. She was taken to a hospital, where first aid was given. The cab driver then drove her to her home at 7033 North Glenwood Avenue, her son and daughter-in-law assisted her to the hospital and to her home.

The same evening Dr. Schneider was called. Plaintiff says she felt terrible pain down in the back and right up to the stomach. She had a headache; her mouth was bruised and bleeding. She wore a set of artificial teeth, both upper and lower plates,

2,

at the time of the accident. These were cracked and broken as a result of the accident. Dr. Schechter put an ice bag on her forehead, three strips across her bare back, took her pulse, examined and gave her a sedative. He came the next day. She was continuously confined to her bed for about two weeks, and the doctor came to see her each day for about that time. She says she had terrific pains in her back and that her head ached. After two weeks she was given lamp treatments for her back by the doctor at his office. She went there twice a week for these treatments for about five months. X-rays were taken. She testified she still had a backache at the trial (May 1945) and has pain when she gets up or sits down. She had never had such troubles before the accident. The doctor advised that she get a belt for her back. She was 57 years old, had been operated on once before for female troubles. She went to Dr. Gottleiner about her teeth. He replaced them and charged her \$125.00, which she paid.

The plaintiff's evidence is corroborated by Dr. Schechter as to her condition and her treatments with him. He says he gave her pills to quiet her pains.

Defendant argues the evidence as to damages is conflicting. We do not find it to be so. There is no question about the bill of Dr. Schechter nor claim that it was unreasonable. He testifies he charged \$175.00, which was the usual, customary and reasonable charge. The dentist was not available as a witness. He was absent in the Army. Plaintiff testified that she paid him \$125.00 for the new set of artificial teeth. It was disclosed on cross-examination that when she first got ^{artificial} ~~the~~ teeth the same sum was paid for them, including service in pulling several teeth she desired to be rid of. This, however, had reference only to the first set of teeth and not the second, replaced because of the injury plaintiff sustained in the cab. Plaintiff

at the time of the accident. There were cracked and broken as a result of the accident. Dr. Rochester put an ice bag on her forehead, three strips across her bare back, took her pulse, examined and gave her a sedative. He came the next day. She was continuously confined to her bed for about two weeks, and the doctor came to see her each day for about

that time. She says she had terrific pain in her back and that her head ached. After two weeks she was given lamp treatment for her back by the doctor at his office. She went there twice a week for these treatments for about five months. X-rays were taken. She testified she still had a backbone at the trial

(May 1948) and has pain when she gets up or sits down. She had never had such troubles before the accident. The doctor advised that she get a belt for her back. She was 37 years old, had been operated on once before for female troubles. She went to Dr. Gottlander about her teeth. He replaced them and charged her \$125.00, which she paid.

The plaintiff's evidence is corroborated by Dr. Rochester as to her condition and her treatment with him. He says he gave her pills to quiet her pains.

Defendant argues the evidence as to damages is conflicting. He does not find it to be so. There is no question about the bill of Dr. Rochester nor claim that it was unreasonable. He testified he charged \$125.00, which was the usual, customary and reasonable charge. The dentist was not available as a witness. He was absent in the city. Plaintiff testified that she paid

him \$125.00 for the new set of artificial teeth. It was disclosed on cross-examination that when she first got teeth the same artificial
 sum was paid for them, in fitting service in getting several teeth she desired to be rid of. This, however, had reference only to the first set of teeth and not the second, replaced because of the injury plaintiff sustained in the car. Plaintiff

3.

testified that the dentist charged her \$125.00 for those, and that she paid it. This evidence is not contradicted. The \$125.00 to the dentist and \$175.00 paid to the doctor made a total of \$300.00, the whole amount of damages allowed by the verdict and judgment. The court instructed the jury that if defendant was found guilty plaintiff would be entitled to have damages assessed for pain and suffering sustained as a result of the injury. It is not claimed the instruction was erroneous. It is perfectly clear the jury disregarded it. We may speculate as to the reason, but there is no evidence on which to base speculation. Plaintiff sued for \$3,000.00. The verdict was \$300.00. Plaintiff's attorney suggest there was a clerical mistake by the foreman of the jury. This is a mere guess. There is nothing in the record to support it.

The fact of negligence on the record is conceded by defendant, and that issue between these parties is settled by the judgment. Another jury should, however, be called to pass on the damages under proper instructions. Harrison v. Bingham, 350 Ill. 269, 273; Novitsky v. Boland, 322 Ill. App. 698; Parthun v. Elgin, Joliet & Eastern R. Co., 325 Ill. App. 408.

The judgment is reversed and the cause remanded with directions to submit the question of damages to another jury,

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and Niemeyer, JJ., concur.

testified that the dentist charged her \$15.00 for those, and that she paid it. This evidence is not contradicted. The \$125.00 to the dentist and \$175.00 paid to the doctor make a total of \$300.00, the whole amount of damages allowed by the verdict and judgment. The court instructed the jury that if defendant was found guilty plaintiff would be entitled to have damages assessed for pain and suffering sustained as a result of the injury. It is not claimed the instruction as erroneous. It is perfectly clear the jury disregarded it. It may speculate as to the reason, but there is no evidence on which to base speculation. Plaintiff sued for \$3,000.00. The verdict was \$300.00. Plaintiff's attorney argued there was a clerical mistake by the foreman of the jury. This is a mere guess. There is nothing in the record to support it.

The fact of negligence on the record is conceded by defendant, and that issue between these parties is settled by the judgment. Another jury should, however, be called to pass on the damages under proper instructions. Harrison v. Harrison, 350 Ill. 289, 277; Switzky v. Polansky, 328 Ill. App. 278; Berthon v. Egan, Joliet & Western R. Co., 325 Ill. App. 404. The judgment is reversed and the case remanded with directions to submit the question of damages to another jury, REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and Niemeyer, JJ., concur.

43653

GOLDBLATT BROS. INC., A Corpora-
tion,

Appellee,

v.

S. R. JORGENSEN,

Appellant.

LEAVE TO APPEAL FROM ORDER
OF MUNICIPAL COURT OF CHICAGO
GRANTING A NEW TRIAL.

328 I.A. 355

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained judgment by confession against defendant for \$387.32. Defendant was given leave to appear and defend, the judgment to stand as security. On trial before the court without a jury, judgment was entered for defendant. On motion of plaintiff, supported by affidavits, a new trial was granted. From this order, leave having been obtained, defendant appeals,

In September 1937 defendant purchased from plaintiff furniture and miscellaneous articles aggregating \$370, paying cash - \$36.39, and agreeing to pay \$25 per month until the balance was paid. He received and retained a folder bearing his name and address, showing the amount of merchandise purchased, the cash paid, the amount to be paid monthly and on which were to be noted subsequent purchases and payments. At the bottom was a notation - "Carrying Charged Omitted if Paid in Full Within 90 Days From Date of Purchase." At the same time he signed a printed form headed WAGE ASSIGNMENT, containing several blanks. This form, before the blanks were filled in, was undated, acknowledged receipt of merchandise of (blank) value and recited an agreement of the defendant to pay a (blank) sum per (blank) period for the use and hire of the merchandise until the stated value of the merchandise had been fully paid, when it should become the property of defendant. By the form the plaintiff was also given full right "at its option at any time hereafter to treat this agreement as a contract of sale at the price above set forth." It also contained a power of attorney to confess

GOLDENBATT BROS. INC., a Corporate

Appellee,

v.

E. R. JOHNSON,

Appellant.

LEAVY & A. J. CHEN
OF NORTHERN COURT OF CHICAGO
GRANITE & LUMBER

325 I.A. 355

MR. JUSTICE LINCOLN DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained judgment by confession against defendant for \$387.32. Defendant was given leave to appear and defend, the judgment to stand as acquiescence. On trial before the court without a jury, judgment was entered for defendant. On motion of plaintiff, supported by affidavits, a new trial was granted. From this order, leave having been obtained, defendant appeals.

In September 1937 defendant purchased from plaintiff furniture and miscellaneous articles aggregating \$370, paying cash - \$38.30, and agreeing to pay \$25 per month until the balance was paid. He received and retained a folder bearing his name and address, showing the amount of merchandise purchased, the cash paid, the amount to be paid monthly and on which were to be noted subsequent purchases and payments. At the bottom was a notation - "Arranging Clearance". Omitted it paid in full within 90 days from date of purchase. At the same time he signed a printed form headed "WAGE ASSIGNMENT", containing several blanks. This form, before the blanks were filled in, was undated, acknowledged receipt of merchandise of (blank) value and recited an agreement of the defendant to pay a (blank) sum per (blank) period for the use and hire of the merchandise until the stated value of the merchandise had been fully paid, when it should become the property of defendant. By the form the plaintiff was also given full right "at its option at any time hereafter to treat this agreement as a contract of sale at the price above set forth." It also contained a power of attorney to confess

2.

judgment and authority to take possession of the merchandise sold on default of payments. Plaintiff filled in the blanks to show the merchandise purchased - \$363.39, carrying charges - \$20, total \$383.39, and monthly payments - \$25. The assignment was dated September 9, 1937, instead of September 11, the date on which defendant claims to have made the purchase and the date shown on the folder given him.

The defense urged on the motion to vacate the judgment was that the assignment was void because of alterations made by plaintiff after defendant had signed it, and that plaintiff had repossessed the furniture under an agreement which released and discharged defendant from his indebtedness. Plaintiff offered no evidence. Defendant testified that when he signed the wage assignment all the spaces were blank - just the printed form; that the only thing said to him was that it was customary to sign an assignment when purchasing from the store; that in May of 1938 Mr. Shay, credit man of plaintiff, in response to defendant's request that plaintiff take the furniture back and release defendant from further payment, replied, "If you will make a payment of ten dollars, I will pick it up over there, and you should hear further from me; but if you don't we will consider it closed, and we will pick up the furniture"; that Shay gave defendant a receipt, received in evidence, dated May 27, 1938, and reciting that the \$10 was to be held by Shay until defendant called upon Shay to arrange for further "dissolution" of his account with plaintiff, and that the money was not to be applied against the unpaid balance until a satisfactory arrangement was agreed upon between defendant and plaintiff.

In support of its motion to vacate the judgment, plaintiff filed the affidavit of Shay in which he stated that from November 1, 1942 to September 30, 1945 he had been a civilian employee of the U. S. Army Air Forces; that he had personal knowledge of the transactions which defendant claimed constituted a release of his obliga-

judgment and authority to take possession of the merchandise sold on default of payments. Plaintiff filed in the blanks to show the merchandise purchased - \$388.32, carrying charges - \$20, total \$408.32, and monthly payments - \$25. The assignment was dated September 11, 1937, instead of September 11, the date on which defendant claims to have made the purchase and the date shown on the folder given him.

The defense moved on the motion to vacate the judgment and that the assignment was void because of irregularities made by plaintiff after defendant had claimed it, and that plaintiff had represented the furniture under an agreement which released and discharged defendant from his indebtedness. Plaintiff offered no evidence. Defendant testified that when he signed the assignment all the spaces were blank - just the printed form; that the only thing said to him was that it was customary to sign an assignment when purchasing from the store; that in May of 1938 Mr. Gray, credit man of plaintiff, in response to defendant's request that plaintiff take the furniture back and release defendant from further payment, replied, "If you will take a receipt of ten dollars, I will pick it up over there, and you should hear further from me; but if you don't we will consider it closed, and we will pick up the furniture"; that they have defendant a receipt, received in evidence, dated May 27, 1938, and reciting that the \$10 was to be held by Gray until defendant called upon Gray to arrange for further "disposition" of his account with plaintiff, and that the money was not to be applied against the unpaid balance until a satisfactory arrangement was agreed upon between defendant and plaintiff. In support of its motion to vacate the judgment, plaintiff filed the affidavit of Gray in which he stated that from November 1, 1937 to September 11, 1938 he had been a civilian employee of the U. S. Army Air Force; that he had personal knowledge of the transactions which defendant claimed constituted a release of his oblig-

3.

tioned to plaintiff, and particularly the receipt dated May 27, 1938; that at no time on that date did he assure defendant that defendant would be released from his indebtedness to plaintiff; that he never stated to defendant that "if defendant would permit certain furniture to be repossessed, that said defendant would be released and discharged from his indebtedness to plaintiff." Plaintiff also filed an affidavit of the attorney representing it on the trial, setting up efforts to locate Shay and inability to do so until after the judgment had been entered, and that Shay could now be produced as a witness.

When defendant signed the wage assignment with the blanks unfilled and delivered it to plaintiff, there was an implied authorization to fill in the blanks in accordance with the understanding of the parties. Schnitzer v. Kramer, 268 Ill. 603; Fisk Tire Co. v. Burmeister, 252 Ill. App. 545. The insertions made by plaintiff are a substantial compliance with that authorization. Defendant's only defense was the alleged agreement of Shay to release the indebtedness, and the burden of establishing that defense rested upon defendant. The affidavit of Shay is a direct contradiction of defendant's testimony and is supported by the receipt signed by Shay. Plaintiff was not negligent in failing to produce Shay on the trial, and the granting of plaintiff's motion for a new trial rested in the discretion of the trial court and that discretion was not abused.

The order appealed from is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

tion to Plaintiff, and particularly the receipt dated May 27, 1938;

that at no time on that date did he assure defendant that defendant

would be released from his indebtedness to Plaintiff; that he

never stated to defendant that "if defendant would permit certain

furniture to be repossessed, that said defendant would be released

and discharged from his indebtedness to Plaintiff." Plaintiff

also filed an affidavit of the attorney representing it on the

trial, setting up efforts to leave they and inability to do so

until after the judgment had been entered, and that they could

now be produced as a witness.

When defendant signed the same assignment with the Illinois

unfiled and delivered it to Plaintiff, there was an implied

authorization to fill in the blanks in accordance with the under-

standing of the parties. Bennett v. Bennett, 208 Ill. 603;

First Nat. Bk. v. First Nat. Bk., 208 Ill. 603. The instructions

made by Plaintiff are a substantial compliance with that authoriza-

tion. Defendant's only defense was the alleged agreement of they

to release the indebtedness, and the burden of establishing that

defense rested upon defendant. The affidavit of they is a direct

contradiction of defendant's testimony and is supported by the

receipt signed by they. Plaintiff was not negligent in failing

to produce they on the trial, and the granting of Plaintiff's

motion for a new trial rested in the discretion of the trial court

and that discretion was not abused.

The order appealed from is affirmed.

APPROVED.

Metzger, F. J., and O'Connor, J., concur.

43679

SAMUEL GERTZ, FLORENCE GROSSMAN
and THEODORE J. HORWITZ, co-
partners doing business as
JUNIOR TOWERS,

Appellees,

v.

LOUIS G. NEIMAN,

Appellant.

196 4
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

323 I.A. 356

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

August 8, 1945 plaintiffs obtained judgment for possession of Apartment No. 8 on the 10th floor of the building at 707 Junior Terrane, together with a stall in the garage in the rear, the writ of restitution being stayed to November 1, 1945. October 31, 1945 defendant filed a petition to vacate the judgment. Plaintiffs answered, and on November 7, 1945 evidence was heard, defendant's motion for leave to file an amendment to his petition was denied and his motion to vacate the judgment overruled. From these orders he appeals.

Plaintiffs' action for possession was based on their plan to immediately alter and substantially remodel the building in which the apartment was located. Defendant's motion to vacate is based on the claim that plaintiffs have changed and modified their plans so that they do not contemplate immediately remodeling or altering the building above the 6th floor, and because of that fact it will not be necessary for plaintiffs to have possession of the apartment occupied by defendant. Plaintiffs' answer states that since the entry of the judgment for repossession, remodeling of the first six floors has progressed to a substantial extent; that at the trial it was shown that plaintiffs intended to remodel the building in two stages - the garage and first six floors immediately, and the remainder of the building when convenient; that all of the tenants of the building

SAMUEL GERTZ, FLORENCE GROSSMAN
and THEODORE J. MORWITZ, co-
partners doing business as
JUNIOR TOWERS,
Appellees,

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

v.
LOUIS G. WEINMAN,
Appellant.

323 I.A. 330

MR. JUSTICE NEWMYER DELIVERED THE OPINION OF THE COURT.

August 8, 1945 plaintiffs obtained judgment for possession of Apartment No. 8 on the 1st floor of the building at 707 Junior Terrace, together with a stall in the garage in the rear, the writ of restitution being stayed to November 1, 1945. October 27, 1945 defendant filed a petition to vacate the judgment. Plaintiff's answer, and on November 7, 1945 evidence was heard, defendant's motion for leave to file an amendment to his petition was denied and his motion to vacate the judgment overruled. From these orders he appeals.

Plaintiffs' action for possession was based on their plan to immediately alter and substantially remodel the building in which the apartment was located. Defendant's motion to vacate is based on the claim that plaintiffs have changed and modified their plans so that they do not contemplate immediately remodeling or altering the building above the 6th floor, and because of that fact it will not be necessary for plaintiffs to have possession of the apartment occupied by defendant. Plaintiffs' answer states that since the entry of the judgment for repossession, remodeling of the first six floors has progressed to a substantial extent; that at the trial it was shown that plaintiffs intended to remodel the building in two stages - the garage and first six floors immediately, and the remainder of the building when convenient; that all of the tenants of the building

2.

including defendant, had been given an opportunity to lease one of the remodeled apartments but defendant insisted upon keeping the apartment on the 10th floor. The answer also asserted need of defendant's apartment during the remodeling to accommodate a tenant accepting a lease of a remodeled apartment, and urged want of jurisdiction to vacate the judgment because of the lapse of more than 30 days after the entry of the judgment.

After hearing evidence tending to support plaintiffs' answer the court denied defendant's petition for want of jurisdiction. After the court had stated his position as to the vacation of the judgment, defendant asked leave to amend his petition to ask for the further stay of the writ of restitution. The court denied this motion. We find no error in its rulings. The application to vacate the judgment was filed too late. (Sec. 21, Municipal Court Act, Ill. Rev. Stat. 1945, chap. 37, par. 376.) If we concede (which we do not) the right of the trial court to stay the writ of restitution indefinitely, as contended by the defendant, the granting of stays would be a matter resting in the discretion of the court, and the record does not show abuse of discretion unfavorable to defendant.

The orders appealed from are affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

including defendant, had been given an opportunity to lease

one of the remodeled apartments but defendant stated

upon keeping the apartment on the 10th floor. The answer

also asserted need of defendant's apartment during the

remodeling to accommodate a tenant as getting a lease of a

remodeled apartment, and urged want of jurisdiction to vacate

the judgment because of the lapse of more than 30 days after

the entry of the judgment.

After hearing evidence tending to support plaintiff's

answer, the court denied defendant's petition for want of

jurisdiction. After the court had stated his position as

to the vacation of the judgment, defendant asked leave to amend

his petition to ask for the further stay of the writ of restitu-

tion. The court denied this motion. He filed no reply in its

filings. The application to vacate the judgment was filed

too late. (Sec. 21, Municipal Court Act, Ill. Rev. Stat. 1945,

chap. 37, par. 216.) If we concede (which we do not) the right

of the trial court to stay the writ of restitution indefinitely,

as conceded by the defendant, the granting of stay would be

a matter resting in the discretion of the court, and the record

does not show abuse of discretion unfavorable to defendant.

The orders appealed from are affirmed.

ATTORNEYS.

Matchett, P. L., and O'Connor, J., counsel.

43635

EBERHART PLAZA, INC.,
Appellant,

v.

ELVIRA HAYES,
Appellee.

APPEAL FROM THE
MUNICIPAL COURT
OF CHICAGO.

328 I.A. 356²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 7, 1945, plaintiff brought an action of forcible detainer against defendant to recover possession of the first apartment of a building known as 449 East 62nd Street, Chicago. The summons was returned "not found". An alias summons was issued and served on defendant. On the 23rd of August the following judgment in defendant's favor was entered: "It is ordered by the Court that this suit be and it hereby is dismissed out of this Court." Afterward plaintiff gave notice to defendant that on the 4th of September it was going to ask leave to file a petition and for an order reinstating the case which it accordingly did. The petition set up that the rent for the apartment which defendant was occupying was \$47 a month; that it had not been paid for the month of July and no payment had been made since that time; that the cause was heard on August 23, at which time defendant was present and acknowledged to the court that she owed the rent mentioned in the five day notice. That thereupon the court ordered defendant to pay the rent to plaintiff within one hour, to which defendant agreed and thereupon the court, on its own motion, dismissed the case. That the rent had not been paid and the prayer was that the judgment be vacated and the cause reinstated. September 4, the matter came on for hearing before another judge; defendant did not appear. Plaintiff's motion to vacate the judgment of

43635

BERNHART FLANK, INC.,
Appellant,
v.
ELVIRA HAYES,
Appellee.

APPEAL FROM THE
CIRCUIT COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 7, 1945, plaintiff brought an action of forcible detainer against defendant to recover possession of the first apartment of a building known as 445 East 82nd Street, Chicago. The summons was returned "not found". An alias summons was issued and served on defendant. On the 23rd of August the following judgment in defendant's favor was entered: "It is ordered by the Court that this suit be and it hereby is dismissed out of this Court." Afterward plaintiff gave notice to defendant that on the 4th of September it was going to ask leave to file a petition and for an order reinstating the case which it accordingly did. The petition set up that the rent for the apartment which defendant was occupying was \$45 a month; that it had not been paid for the month of July and no payment had been made since that time; that the case was heard on August 23, at which time defendant was present and acknowledged to the court that she owed the rent mentioned in the five day notice. That thereupon the court ordered defendant to pay the rent to plaintiff within one hour, to which defendant agreed and thereupon the court, on its own motion, dismissed the case. That the rent had not been paid and the prayer was that the judgment be vacated and the cause reinstated. September 4, the matter came on for hearing before another judge; defendant did not appear. Plaintiff's motion to vacate the judgment of

2.

August 23 and to reinstate the cause was allowed. The case was then heard. The court found defendant guilty of wrongfully withholding possession of the premises in question and ordered that the writ of restitution be stayed 5 days. September 13, pursuant to notice, the parties appeared before a third judge and an order was entered continuing the matter until the next day at which time the court ordered that the judgment of September 4, 1945, be vacated. The judgment order further recites that the matter came on for hearing without a jury; that the court heard the evidence and found defendant not guilty. From this judgment plaintiff prosecutes this appeal, and September 19, filed its notice of appeal and its verified petition which purports to set up the facts in the case, from which it appears that the rent was not paid within the hour after the judgment of dismissal was entered August 23; that it was tendered for the three months then due on the 11th of September but that plaintiff refused to accept the money.

There was no warrant in law for entering the judgment of August 23, dismissing the suit, and this judgment was properly set aside on September 4, when he heard the evidence and found for plaintiff. Judgment was entered on the finding, and on September 14, the court was without authority in again hearing the case and finding defendant not guilty, for the sole reason that she had tendered the rent on September 11 and again on the 14. At that stage of the proceeding plaintiff was not obliged to receive the rent.

The judgment of the Municipal court of Chicago appealed from is reversed and the cause remanded with directions to reinstate the judgment of September 4, 1945.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and Niemeyer, J., concur.

August 23 and to reinstate the cause was allowed. The case was then heard. The court found defendant guilty of knowingly withholding possession of the premises in question and ordered that the writ of restitution be stayed 6 days. September 10, pursuant to notice, the parties appeared before a third judge and an order was entered postponing the matter until the next day at which time the court ordered that the judgment of September 4, 1945, be vacated. The judgment order further recites that the matter came on for hearing without a jury; that the court heard the evidence and found defendant not guilty. From this judgment plaintiff prosecuted this appeal, and September 19, filed its notice of appeal and its verified petition which purports to set up the facts in the case, from which it appears that the rent was not paid within the time after the judgment of dismissal was entered August 23; that it was demanded for the three months then due on the 15th of September but that plaintiff refused to accept the money.

There was no warrant in law for entering the judgment of August 23, dismissing the suit, and this judgment was properly set aside on September 4, when he heard the evidence and found for plaintiff. Judgment was entered on the finding, and on September 14, the court was without authority in again hearing the case and finding defendant not guilty, for the sole reason that she had tendered the rent on September 11 and again on the 14. At that stage of the proceeding plaintiff was not obliged to receive the rent.

The judgment of the Municipal Court of Chicago appealed from is reversed and the cause remanded with directions to restate the judgment of September 4, 1945.

REVEREND AND HONORABLE WITH DIRECTIONS.

Matchett, P. J., and Niemeyer, J., concur.

43649 } Consolidated.
43650 }

A. E. CARPENTER, Trustee,
Appellee,

v.

SAMUEL DICK PRYCE and
ELIZABETH DREW PRYCE,
Appellants.)

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

328 I.A. 357

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 6, 1945, A. E. Carpenter, as trustee under the last will and testament of Edward R. Hall, deceased, filed his complaint in chancery to foreclose the lien of a trust deed given on premises in Evanston, to secure an indebtedness of \$30,000 evidenced by a promissory note. After the issues were made up the cause was referred to a master in chancery who took the evidence, made up his report and recommended that a decree of foreclosure be entered as prayed for. Objections which afterward stood as exceptions were overruled and on October 1, 1945, a decree of foreclosure and sale in the usual form was entered. October 25, 1945, defendants filed a notice of appeal and a motion that the sale be stayed pending an appeal to this court. The motion was denied and on the next day an order was entered approving defendants' appeal bond. The bond is not in the record but on the oral argument it was admitted that the bond was a cost bond for \$250. Afterward the property was sold by the master to plaintiff for \$22,500. November 1, 1945, the master's report of sale and distribution was approved and a deficiency decree for \$15,381.72 was entered against defendants. November 17 they filed notice of appeal from the decree of November 1, 1945.

The record discloses that June 23, 1928, Wayland L.

43849 } Consolidated
43850 }

A. E. CARPENTER, Trustee,
Appellee,

v.

SAMUEL DICK PRYCE and
ELIZABETH DREW PRYCE,
Appellants.

APPEAL FROM
CIRCUIT COURT,
GOOSE COUNTRY.

3281A.357

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 6, 1945, A. E. Carpenter, as trustee under the last will and testament of Edward R. Hall, deceased, filed his complaint in chancery to foreclose the lien of a trust deed given on premises in Vanaton, to secure an indebtedness of \$30,000 evidenced by a promissory note. After the issues were made up the cause was referred to a master in chancery who took the evidence, made up his report and recommended that a decree of foreclosure be entered as prayed for. Objections which afterward stood as exceptions were overruled and on October 1, 1945, a decree of foreclosure and sale in the usual form as entered. October 25, 1945, defendants filed a notice of appeal and a motion that the sale be stayed pending an appeal to this court. The motion was denied and on the next day an order was entered approving defendants' appeal bond. The bond is not in the record but on the oral argument it was admitted that the bond was a cash bond for \$250. Afterward the property was sold by the master to plaintiff for \$25,500. November 1, 1945, the master's report of sale and distribution was approved and a deficiency decree for \$4,381.72 was entered against defendants. November 17 they filed notice of appeal from the decree of November 1, 1945. The record discloses that June 23, 1938, Maryland A.

2.

Cocroft and Elsie Cocroft, his wife, executed their promissory note payable to bearer for \$30,000 due five years after date with interest at 5 1/2 per cent per annum and to secure the payment, on the same day executed their trust deed conveying the premises in question to the Chicago Title & Trust Company, Trustee. The premises were improved by a 2 and one-half story and basement frame residence located in Evanston. The property was originally owned by Edward R. Hall who sold it to the Cocrofts who took in part payment the note and trust deed. Some 6 months afterward the Cocrofts sold the property to defendants, Samuel Dick Pryce and Elizabeth Drew Pryce, his wife, for \$26,500 cash and they assumed the \$30,000 mortgage. When the indebtedness came due June 23, 1933, Edward R. Hall, by his son, Edward B. Hall, and defendants, executed a written agreement extending the time of payment for a period of 5 years or until June 23, 1938. And on June 23, 1938, the same parties executed another agreement extending the time of payment of the \$30,000 for a period of 5 years or until June 23, 1943. That extension agreement further provided that if the Pryces should pay \$5,000 on account of the principal on or before June 23, 1939, the indebtedness evidenced by the note for \$30,000 would be reduced to \$20,000 and the rate of interest to 4 1/2 per cent upon the \$20,000. By the terms of the extension agreements all of the provisions of the trust deed except as therein changed, should continue in force and effect. No part of the \$5,000 mentioned was paid. May 3, 1941, the son, Edward B. Hall, wrote defendant, Samuel Pryce saying: "When the note which I hold for my father's account, secured by mortgage on your residence at the above address, [1735 Chicago Avenue, Evanston, Illinois] comes due in June, 1943, I hereby agree, if you request it, to renew the loan for another period of five years on the same terms." The father, Edward R. Hall, the owner of the note and trust deed died testate shortly

the owner of the note and trust deed dated shortly of five years on the same terms. The father, Edward B. Hall, Avenue, Evanston, Illinois, comes due in June, 1933, I hereby agree, if you request it, to renew the loan for another period by mortgage on your residence at the above address, 11733 Chicago "When the note which I hold for my father's account, secured son, Edward B. Hall, wrote defendant, Samuel Pryce saying: No part of the \$5,000 mentioned was paid. May 2, 1931, the extension agreements all of the provisions of the trust deed except as therein changed, should continue in force and effect. to 4 1/2 per cent upon the \$20,000. By the terms of the \$20,000 would be reduced to \$20,000 and the rate of interest June 23, 1939, the indebtedness evidenced by the note for should pay \$2,000 on account of the principal on or before That extension agreement further provided that in the event the \$20,000 for a period of 5 years or until June 23, 1944. executed another agreement extending the time of payment of or until June 23, 1938. And on June 23, 1938, the same parties agreement extending the time of payment for a period of 5 years by his son, Edward B. Hall, and defendant, executed a written When the indebtedness came due June 23, 1938, Edward B. Hall, wife, for \$25,500 cash and they assumed the \$20,000 mortgage. defendant, Samuel Black Pryce and Elizabeth Brew Pryce, in some 6 months after the George sold the property to George who took in part payment the note and trust deed. was originally owned by Edward B. Hall who sold it to the and permanent income residence located in Evanston. The property Trustees. The premises were improved by a 3 and one-half story the premises in question to the Chicago Title Trust Company, payment, on the same day executed their first deed conveying with interest at 5 1/2 per cent per annum and to secure the note payable to bearer for \$20,000 due five years after date George and Elsie George, his wife, executed their promissory

3.

before June, 1943 and plaintiff, A. E. Carpenter, was appointed executor and trustee under the will and apparently, after the estate was closed in Florida, plaintiff held the note as trustee and afterward filed this suit. No part of the principal has been paid and the interest was paid to June 23, 1943 but no payment of interest was made thereafter.

Defendants contend that the indebtedness did not become due June 23, 1943 for the reason that they were entitled to have the time of payment extended, in accordance with the letter of May 3, 1941, as above quoted.

The evidence further shows that after Mr. Hall, Sr's death, defendants called on his son, were advised of that fact and they then took the matter up with Mr. Carpenter, the plaintiff.

Counsel for plaintiff say that it was admitted on the hearing before the master, and is admitted here, that any agreement made by Mr. Hall, Jr., would be binding on his father's estate but they point out that under the evidence, the defendants did not seek to have the time of payment extended either by Mr. Hall, Jr., or plaintiff, Mr. Carpenter. June 15, 1943, defendant, Mr. Pryce, wrote Mr. Carpenter at Orlando, Florida, stating that he usually had dealt with Mr. Ed. Hall regarding the Evanston matter and had called on him but found he was no longer representing the father, who had died. The letter continued: "As you know the property is now valued at \$17,000.00 or thereabouts. The bank has offered to take over the loan at approximately \$10,000.00. I presume you would like to settle the estate. I should like very much to settle the mortgage for about \$10,000.00. If you are willing to carry the mortgage at \$10,000.00, I will pay 6% the first year, 5% the second and 4 1/2% thereafter for the term of the mortgage. I trust that this will meet with your approval and shall be glad to hear from you." Two days afterward, June 17, 1943, Carpenter replied acknowledging receipt of the letter and stating that

before June 1943 and Plaintiff, J. J. Carpenter, was appointed executor and trustee under the will and subsequently, after the estate was closed in Florida, Plaintiff held the note as trustee and afterwards filed this suit. No part of the principal has been paid and the interest was paid to June 23, 1943 but no payment of interest was made thereafter.

Defendants contend that the indebtedness did not become due June 23, 1943 for the reason that they were entitled to have the time of payment extended, in accordance with the letter of May 3, 1941, as above quoted.

The evidence further shows that after Mr. Hall, Jr.'s death, defendants called on his son, were advised of that fact and they then took the matter up with Mr. Carpenter, the Plaintiff. Counsel for Plaintiff says that it was admitted on the

hearing before the master, and is admitted here, that any agreement made by Mr. Hall, Jr., would be binding on his father's estate but they point out that under the evidence, the defendants did not seek to have the time of payment extended either by

Mr. Hall, Jr., or Plaintiff, J. J. Carpenter. June 18, 1943, defendant, Mr. Pryce, wrote Mr. Carpenter at Orlando, Florida, stating that he usually had dealt with Mr. H. Hall regarding the Eganston matter and had called on him but found he was no longer representing the father, who had died. The letter

continued: "As you know the property is now valued at \$17,000.00 or thereabouts. The bank has offered to take over the loan at approximately \$10,000.00. I presume you would like to settle the estate. I should like very much to settle the mortgage for about \$10,000.00. If you are willing to carry the mortgage

at \$10,000.00, I will pay 8% the first year, 5% the second and 4 1/2% thereafter for the term of the mortgage. I trust that it is all meet with your approval and shall be glad to hear from you." Two days afterwards, June 17, 1943, Carpenter replied acknowledging receipt of the letter and stating that

4.

the mortgage was one of the assets belonging to the estate of Edward R. Hall, deceased, of which he was acting as executor; that the mortgage was left in trust with directions as to disposition of the money; when paid; that "I am not particularly interested in a reduction of the principal amount. It is my duty to make the fund produce as much income as possible and at the same time preserve the fund so far as possible for the future owners.***

"If your offer is to pay \$10,000.00 and wipe out the mortgage, I think that I can say at present that the offer is rejected." Afterward, July 28, 1943, Mr. Pryce again wrote plaintiff acknowledging the letter of June 17, stating that he had recently solicited several parties as to the value of the property and that:

"The concensus of opinion seems to be that the place will not bring more than \$15,000 if sold at forced sale. I should be glad to have you verify this figure and if you find it correct will suggest the following proposition.

"The present mortgage to be reduced to \$15,000, the full valuation of the property. Said mortgage to run for at least five years with the privilege of renewal for a second five years, and bear interest at the rate of four and one-half per cent payable semi-annually; we to have the privilege of making pre-payments of \$500 or multiples thereof on any interest day by giving written notice sixty days in advance.

"We believe this is the maximum that can be realized from this property and feel that we should receive consideration ahead of any possible buyer at the same figure."

Plaintiff did not reply to this letter until May 15, 1944, when he refers to defendants' letter of June 15, 1943, above quoted, and says: "The \$10,000 which you offered was not at all satisfactory, and at this time I will be pleased to receive some further word from you as to your position, and in the meantime I am discussing the matter with those primarily interested."

the mortgage was one of the assets belonging to the estate of Edward H. Hall, deceased, of which he was acting as executor; that the mortgage was left in trust with directions as to disposition of the money; when said "I am not particularly interested in a reduction of the principal amount. It is my duty to make the fund produce as much income as possible and at the same time preserve the fund as far as possible for the future owners."

"If your offer is to pay \$10,000.00 and also the mortgage, I think that I can say at present that the offer is rejected." Afterward, July 28, 1945, Mr. Joyce again wrote plaintiff acknowledging the letter of June 17, stating that he had recently solicited several parties as to the value of the property and that:

"The consensus of opinion seems to be that the place will not bring more than \$15,000 if sold at forced sale. I should be glad to have you verify this figure and if you find it correct will suggest the following proposition.

"The present mortgage to be reduced to \$15,000, the full valuation of the property. Said mortgage to run for at least five years with the privilege of renewal for a second five years, and bear interest at the rate of four and one-half per cent payable semi-annually; we to have the privilege of making pre-payments of \$500 or multiples thereof on any interest due by giving written notice sixty days in advance.

"We believe this is the maximum that can be realized from this property and feel that we should receive consideration ahead of any possible buyer at the same figure."

Plaintiff did not reply to this letter until July 18, 1945, when he refers to defendant's letter of June 18, 1945, above quoted, and says: "The \$10,000 which you offered was not at all satisfactory, and at this time I will be pleased to receive some further word from you as to your position, and in the meantime I am discussing the matter with those primarily interested."

5.

There was further correspondence but no agreement was reached and this foreclosure suit was brought.

The master and the chancellor each found there was no valid agreement between the parties to extend the time of payment beyond June 23, 1943. But we think the evidence shows that defendants did not ask that they be given a further extension but submitted a new proposition which was rejected.

Upon a consideration of all the evidence in the record, we are clearly of opinion that the finding is in accordance with the evidence. The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and Niemeyer, J., concur.

The master and the chancellor each found there was no new event since those relations and the return of

that defendants did not ask that they be given a further

we are clearly of opinion that the finding is in accordance

• 607177A 01 470000

Hatchett, F. L., and Wiegner, J., personal.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
FEBRUARY TERM, A. D. 1946

Gen. No. 9476

Agenda No. 1

Finis E. Downing,
Complainant,

vs.

William B. Finn, et al.,
Defendants.

William B. Finn,
Cross Complainant-
and Appellee,

vs.

Centennial National Bank,
Cross Defendant-
and Appellant.

Centennial National Bank,
Plaintiff-Appellant)

vs.

William B. Finn,
Defendant-Appellee.)

Wheat, J.

Appeal from

Sangamon County

Circuit Court.

328 I.A. 397¹

This is an appeal from a decree of the Circuit Court of Sangamon County ordering appellant, Centennial National Bank, to pay appellee, William B. Finn, the sum of \$10,270.67, with interest, as a result of an accounting relating to transactions involving certain real estate known as the Opera House in Virginia, Illinois. This accounting was ordered by a prior decree of said Court, which decree was substantially affirmed by this Court on appeal. (Downing v. Finn, 308 Ill. App. 366.) As the opinion in such case is printed in abstract form, a brief history of the entire transaction and litigation is herein-

9362

UNITED STATES DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY
WASHINGTON, D. C.

1. *Staphylococcus aureus* (100%)

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1917

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1. Explain the importance of the
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Table 2. Effect of duration of exposure to the insecticide on mortality

[illegible]

after set forth for the purpose of making the issues in the current appeal more understandable. Such condensation is difficult as the report of proceedings comprises over nineteen hundred pages.

In 1915 and 1916, a foreclosure proceeding was had in the Circuit Court of Cass County involving the Opera House property against which the bank held a junior mortgage. A certificate of sale was issued in the name of Henry Jacobs who later assigned the same to Finn. As to most of the subsequent proceedings, one dominant issue was as to whether Finn dealt directly with Jacobs or was fraudulently induced to make the deal by the cashier of the bank. A Master's deed was issued to Finn in 1917, by virtue of the certificate so purchased by him, and he went into possession. In 1926, the mortgagor, Downing, was successful in a suit to redeem the property because of defective foreclosure proceedings involving the subject of fraud on the part of the bank. In such suit, an accounting was had by the Court between Downing and Finn. While this suit was pending, on August 31, 1933, Finn filed a cross-bill against the bank, charging that the latter was the real party in interest as defendant in the Downing suit, charging fraud by the bank in his purchase of the Jacob's certificate of sale, and asking for an accounting between himself and the bank. He was successful in this action and the decree granting him relief, entered May 19, 1939, was, in substance, affirmed by this Court as above stated. Thereafter, the Circuit Court referred the matter of accounting to a special Master in Chancery, whose report of findings was approved by the

Circuit Court and embodied in its decree of December 16, 1944, which, as aforesaid, ordered the bank to pay to Finn the sum of \$10,270.67, and interest. This decree also dismissed a complaint, in the nature of a bill of review, filed by the bank against Finn, during the pendency of the accounting suit, which complaint prayed for vacation of the decree of May 19, 1939, on the ground of fraud, and for judgment against Finn. It is from this decree of December 16, 1944, ordering the payment under the accounting and dismissing the complaint in the nature of a bill of review that this appeal has been taken.

The action of the Court in dismissing the complaint in the nature of a bill of review will first be considered. The complaint charges that Finn committed a fraud upon the Circuit Court and this Court by his testimony in the earlier proceeding, upon which the decree of May 19, 1939, was based. In substance, this testimony was, according to the complaint, that in the earlier proceeding, Finn falsely testified that he purchased the certificate of sale from the bank, and not from Jacobs, for the sum of \$9,000.00, and that he purchased the picture show outfit from Jacobs for \$450.00, which was a different and separate transaction. The complaint alleges that in connection with the subsequent testimony of Finn on March 27, 1942, he produced a memorandum as follows:

" Memorandum of Agreement between Henry
Jacobs and W. B. Finn: Sale of Certificate of
Sale Tureman Opera house and picture show outfit.
Contract to be drawn on terms agreed on, by Chas.
A. Gridley. Total consideration \$9,450.00.

[illegible][illegible]

Expense to be deducted for today reels \$12.50
Express \$2.00 Paper 65¢ Piano player \$2.00
Lights \$1.00 Misc \$1.85 Total \$20.00 Lease
to be assigned. Cash paid \$450.00

Henry Jacobs

Wm. B. Finn "

He testified that this was written by Henry Jacobs, signed at the latter's home, March 10, 1917, in the presence of Mrs. Jacobs and her daughter.

A careful examination of the pleadings in the earlier proceedings indicates that the issue was not whether Jacobs was the owner of the certificate of purchase, as this was admitted, but whether the bank had induced Finn to make the deal regardless of the ownership of the certificate, and whether the bank promised to protect Finn and to see that he obtained good title. The evidence as to such issues indicates that it was recognized by both sides that Jacobs had the legal title to the certificate of sale, but there is no evidence that he ever tried to persuade Finn to buy it. The real issue was as to whether the bank fraudulently induced Finn to become a purchaser of the said real estate and whether Finn suffered loss thereby. The certificate of sale was issued to Jacobs, March 20, 1916; Finn's testimony was that his negotiations with the bank began in January, 1917, and continued until the deal was completed in March of that year; his testimony was considered as credible by the prior findings of the Master, the Trial Judge, and this Court in the former appeal. The execution of the memorandum in question, March 10, 1917, was

EXPENSES OF THE BOARD OF DIRECTORS OF THE COMPANY FOR THE YEAR 1999

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OTHER COUNTRIES: 0007-1226/80/0000-0000

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is true of the United States as a whole, and also of the individual States. The majority of the population of the United States is of European descent, and this is true of the individual States. The majority of the population of the United States is of European descent, and this is true of the individual States.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the activities of the British Security Organisation (BSO) in the United States.

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THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C. 20250

not contradictory of Finn's prior testimony but is consistent therewith, being but one incident of many necessary to the consummation of the transaction. The evidence justifies the decree of May 19, 1939, and the prior affirmance by this Court of such decree. It does not appear that if such memorandum had been produced in the earlier proceeding it would have been of such an important and decisive character as would have produced a different result nor would a different conclusion have been drawn from the entire evidence. The Court was not in error in dismissing this complaint for want of equity.

As to the accounting, consideration will next be given to the matter of the profit on the transaction relating to the Virginia Building and Savings Association stock. In 1917, upon receiving a deed for the property, Finn executed a note of \$6,000.00, secured by a mortgage on the Opera House, to the Virginia Building and Savings Association and subscribed to a like amount of its stock. In the following 120 months, through monthly payments, the stock matured to a value of \$6,000.00, which was paid to Finn instead of being applied toward the cancellation of the mortgage. The decree permitted Finn to have a credit in the accounting for a sum of \$581.34, which represented earnings or dividends over and above the fixed rate of interest then being paid by the association, which sum the bank claims should be credited to it. Although the decree of May 19, 1939, ordering the accounting, provided that the bank was to account to Finn "for all losses * * * sustained or suffered on account of the supposed purchase of said real estate, including all money and obligations paid the said

Centennial National Bank or said Virginia Building and Savings Association", we believe that the stock transaction was so inseparably interwoven in the entire subject matter as to require a construction of the decree directing Finn to account for his profit, as well as his loss, in the transaction.

The remaining disputed matter relates to the rental value of the Opera House. The bank contends that such value was fixed in the original accounting suit brought by Downing at the sum of \$600.00 per year, unheated, under and by which computation instead of the bank owing Finn any amount, the latter would be indebted to the bank in the sum of \$2,367.57, or, if the aforesaid stock profit were included, in the sum of \$2,948.91. In the instant case, the rental value was fixed at \$500.00 per year, with credit for the cost of heating. The bank charges that the matter is res adjudicata because Finn was an active defendant in such suit and because the issue was the same as in the later and accounting suit between Finn and the bank. The general rule seems to be that as between co-defendants, the judgment adjudicates nothing which might have been, but which was not in fact, put in issue between them, but if an adjudication of issues is made between co-parties, it is res adjudicata in subsequent litigation between them, even though their separate answers did not purport to raise such issues as to each other. In so far as their rights and obligations are dependent upon their rights or obligations toward their common adversary, the judgment adjudicating the latter is conclusive upon co-defendants in subsequent litigation between them.

CONFIDENTIAL - This document contains information which is exempt from public release under the provisions of the Freedom of Information Act, 5 U.S.C. 552, and is to be controlled, stored, handled, transmitted, and disposed of in accordance with the provisions of the Atomic Energy Act, 42 U.S.C. 2014(c)(1), and the Atomic Energy Regulations, 10 C.F.R. 101.6, 101.7, 101.8, 101.9, 101.10, 101.11, 101.12, 101.13, 101.14, 101.15, 101.16, 101.17, 101.18, 101.19, 101.20, 101.21, 101.22, 101.23, 101.24, 101.25, 101.26, 101.27, 101.28, 101.29, 101.30, 101.31, 101.32, 101.33, 101.34, 101.35, 101.36, 101.37, 101.38, 101.39, 101.40, 101.41, 101.42, 101.43, 101.44, 101.45, 101.46, 101.47, 101.48, 101.49, 101.50, 101.51, 101.52, 101.53, 101.54, 101.55, 101.56, 101.57, 101.58, 101.59, 101.60, 101.61, 101.62, 101.63, 101.64, 101.65, 101.66, 101.67, 101.68, 101.69, 101.70, 101.71, 101.72, 101.73, 101.74, 101.75, 101.76, 101.77, 101.78, 101.79, 101.80, 101.81, 101.82, 101.83, 101.84, 101.85, 101.86, 101.87, 101.88, 101.89, 101.90, 101.91, 101.92, 101.93, 101.94, 101.95, 101.96, 101.97, 101.98, 101.99, 101.100, 101.101, 101.102, 101.103, 101.104, 101.105, 101.106, 101.107, 101.108, 101.109, 101.110, 101.111, 101.112, 101.113, 101.114, 101.115, 101.116, 101.117, 101.118, 101.119, 101.120, 101.121, 101.122, 101.123, 101.124, 101.125, 101.126, 101.127, 101.128, 101.129, 101.130, 101.131, 101.132, 101.133, 101.134, 101.135, 101.136, 101.137, 101.138, 101.139, 101.140, 101.141, 101.142, 101.143, 101.144, 101.145, 101.146, 101.147, 101.148, 101.149, 101.150, 101.151, 101.152, 101.153, 101.154, 101.155, 101.156, 101.157, 101.158, 101.159, 101.160, 101.161, 101.162, 101.163, 101.164, 101.165, 101.166, 101.167, 101.168, 101.169, 101.170, 101.171, 101.172, 101.173, 101.174, 101.175, 101.176, 101.177, 101.178, 101.179, 101.180, 101.181, 101.182, 101.183, 101.184, 101.185, 101.186, 101.187, 101.188, 101.189, 101.190, 101.191, 101.192, 101.193, 101.194, 101.195, 101.196, 101.197, 101.198, 101.199, 101.200, 101.201, 101.202, 101.203, 101.204, 101.205, 101.206, 101.207, 101.208, 101.209, 101.210, 101.211, 101.212, 101.213, 101.214, 101.215, 101.216, 101.217, 101.218, 101.219, 101.220, 101.221, 101.222, 101.223, 101.224, 101.225, 101.226, 101.227, 101.228, 101.229, 101.230, 101.231, 101.232, 101.233, 101.234, 101.235, 101.236, 101.237, 101.238, 101.239, 101.240, 101.241, 101.242, 101.243, 101.244, 101.245, 101.246, 101.247, 101.248, 101.249, 101.250, 101.251, 101.252, 101.253, 101.254, 101.255, 101.256, 101.257, 101.258, 101.259, 101.260, 101.261, 101.262, 101.263, 101.264, 101.265, 101.266, 101.267, 101.268, 101.269, 101.270, 101.271, 101.272, 101.273, 101.274, 101.275, 101.276, 101.277, 101.278, 101.279, 101.280, 101.281, 101.282, 101.283, 101.284, 101.285, 101.286, 101.287, 101.288, 101.289, 101.290, 101.291, 101.292, 101.293, 101.294, 101.295, 101.296, 101.297, 101.298, 101.299, 101.300, 101.301, 101.302, 101.303, 101.304, 101.305, 101.306, 101.307, 101.308, 101.309, 101.310, 101.311, 101.312, 101.313, 101.314, 101.315, 101.316, 101.317, 101.318, 101.319, 101.320, 101.321, 101.322, 101.323, 101.324, 101.325, 101.326, 101.327, 101.328, 101.329, 101.330, 101.331, 101.332, 101.333, 101.334, 101.335, 101.336, 101.337, 101.338, 101.339, 101.340, 101.341, 101.342, 101.343, 101.344, 101.345, 101.346, 101.347, 101.348, 101.349, 101.350, 101.351, 101.352, 101.353, 101.354, 101.355, 101.356, 101.357, 101.358, 101.359, 101.360, 101.361, 101.362, 101.363, 101.364, 101.365, 101.366, 101.367, 101.368, 101.369, 101.370, 101.371, 101.372, 101.373, 101.374, 101.375, 101.376, 101.377, 101.378, 101.379, 101.380, 101.381, 101.382, 101.383, 101.384, 101.385, 101.386, 101.387, 101.388, 101.389, 101.390, 101.391, 101.392, 101.393, 101.394, 101.395, 101.396, 101.397, 101.398, 101.399, 101.400, 101.401, 101.402, 101.403, 101.404, 101.405, 101.406, 101.407, 101.408, 101.409, 101.410, 101.411, 101.412, 101.413, 101.414, 101.415, 101.416, 101.417, 101.418, 101.419, 101.420, 101.421, 101.422, 101.423, 101.424, 101.425, 101.426, 101.427, 101.428, 101.429, 101.430, 101.431, 101.432, 101.433, 101.434, 101.435, 101.436, 101.437, 101.438, 101.439, 101.440, 101.441, 101.442, 101.443, 101.444, 101.445, 101.446, 101.447, 101.448, 101.449, 101.450, 101.451, 101.452, 101.453, 101.454, 101.455, 101.456, 101.457, 101.458, 101.459, 101.460, 101.46

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(1 Freeman on Judgments, 5th Ed. Sec. 425). It is also the general rule that the only parties concluded by a decree are adversary parties and the matter determined must be in issue between them, either by pleadings or in fact. If no issue between co-defendants in a chancery suit is presented and adjudicated, the decree is not evidence in favor of either party against the other. (Renfro v. Hanon, 297 Ill. 353).

It must be kept in mind that the issue in the original suit of Downing related to the right to redeem and that the matter of rental value was incidental; that the decree in that suit, which was not appealed from, specifically stated that the foreclosure proceedings, in so far as the bank was concerned, constituted a fraud upon the Court by reason of which, the decree of foreclosure was set aside. Subsequently, Finn obtained leave to file a cross-bill based upon the fact that he was only a nominal defendant in this suit; that the real defendant was the bank; that the attorneys appearing were those retained and paid by the bank and that he relied upon the promises of the bank to protect his interests. He also pointed out that he was charged with an item of \$8,853.65 for money which the bank received and kept, which error is admitted by the bank. In other words, Finn's position was, and is, that the bank was the real defendant, that there was no privity in interest and that he was merely co-operating with such bank in reliance upon its promise of protection. In permitting the filing of the cross-bill by Finn against the bank, the Trial Court presumably concluded that they were not adversaries in the Downing suit. The Circuit Court, in its decree of May 19, 1939, likewise found that the said bank "not only promised to protect William B. Finn and see that he

(1) Section on "Matters of Fact". It is also

The present bill does not help towards removal of a burden
the difficulty between the parties concerned with it is
between them, it is to be decided by the court. It is
therefore not a matter of fact. It is a matter of law
and (2) Section on "Matters of Law". The bill is not
helpful against the law. (Section 5, 1911, 1912)

It will be seen that the bill is not

helpful in the removal of a burden from the parties
between the parties of legal rights and interests. The bill
in fact does not help towards removal of a burden from
the parties concerned. It is to be decided by the court
and (3) Section on "Matters of Fact". It is also

helpful in the removal of a burden from the parties
between the parties of legal rights and interests. The bill
in fact does not help towards removal of a burden from
the parties concerned. It is to be decided by the court

and (4) Section on "Matters of Law". The bill is not
helpful against the law. (Section 5, 1911, 1912)

It will be seen that the bill is not
helpful in the removal of a burden from the parties
between the parties of legal rights and interests. The bill
in fact does not help towards removal of a burden from
the parties concerned. It is to be decided by the court

and (5) Section on "Matters of Fact". It is also
helpful in the removal of a burden from the parties
between the parties of legal rights and interests. The bill
in fact does not help towards removal of a burden from
the parties concerned. It is to be decided by the court

got a good title but apparently considered the Downing suit its own law suit and protected William B. Finn at its own expense by defending the same until the final determination thereof." This Court, on appeal, likewise stated, "Under the terms of said decree, it was adjudicated that the foreclosure proceedings and sale thereunder, including the certificate of purchase, were void; that a fraud had been committed in obtaining the order of sale, the foreclosure, and the issuance of the ^{certificate of} purchase in question, and that said certificate was absolutely void and worthless from the time of its execution. It is a fair deduction that the lawyers who obtained the decree of foreclosure, the order of sale, and the issuance of the ~~the~~ certificate, perpetrated this fraud for and in behalf of the bank, with notice and knowledge to the bank's agents and attorneys. Therefore the bank is chargeable with the same * * * the obtaining of the foreclosure in the first instance, and the issuance of the certificate of purchase, were a fraud upon the Court, in which the bank, through its agents, had participated. The selling of the certificate, which was a spurious instrument, by McDonald to Finn, amounted to fraud and deceit, for which the bank was responsible." (Downing v. Finn, supra).

In view of this state of the record relating to the repeated determination by several special Masters in Chancery, the Trial Court, and this Court, no conclusion can be drawn but that the bank committed a fraud upon Finn; that at the earlier hearing, in which Downing was the plaintiff, the said Finn was not adequately represented; that no issue was made as between his theory of the case and that of the bank and that the

and a good deal of the time spent in the hospital.

The first time this was done was in 1871 and the

second in 1872 and the third in 1873.

During the first time, the hospital was

very small, and the number of patients

was not very large, but it was

very comfortable, and the patients

were very well treated.

The second time, the hospital was

larger, and the number of patients

was larger, and the treatment

was better, and the patients

were very well treated.

The third time, the hospital was

very large, and the number of patients

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were very well treated.

The fourth time, the hospital was

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The fifth time, the hospital was

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were very well treated.

The sixth time, the hospital was

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was very good, and the patients

sole interest of the bank in such case was to obtain the best settlement possible with Downing, ignoring the interests of Finn in such proceeding; and that Finn had no adequate opportunity of cross examination of witnesses. Under these circumstances, it cannot be said that the interests of Finn and the bank were identical in the accounting between Downing and the real defendant, the bank. The defense of res adjudicata is not applicable.

It is further contended that Finn should be denied relief by reason of laches; that he adopted the original Master's findings as to rental value by making them a part of his cross-complaint, claiming only one-half of the heating expense and delaying his change of position, claiming credit for all heating expenses, for eight years, at which time certain witnesses had died.

A reading of the cross-complaint filed by Finn, August 31, 1933, discloses that the gist of his action was the wrongful acts, misrepresentations and fraud committed by the bank to his damage in the sum of \$60,000.00. His principal prayer for relief, then, was that an accounting be ordered, and the attaching to his cross-complaint, as an exhibit, the Master's report in the suit brought by Downing, was for the apparent purpose of pointing out the inequitable position he was then in. He did not know that he was to get the desired relief until the opinion of this Court was filed, October 15, 1940, and re-hearing was denied, February 5, 1941. Pursuant to the order of this Court, the Circuit Court, on September 8, 1941, entered its modification decree. On December 8, 1941,

and the fact that the Government has been unable to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic of China.

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he filed his motion to amend his cross-complaint, by claiming credit for all heating expenses. We cannot say that the Trial Court erred in allowing this amendment, or in its decree approving the findings of the Master thereunder. The subject of the amendment did not constitute a new cause of action and was germane to the original relief sought.

It is urged that the Master and the Court should have considered as competent evidence the former testimony in the Downing suit of three witnesses who have since died. This is considered as immaterial on the question as to whether the finding of the Trial Court, on rental value, was against the manifest weight of the evidence, as we cannot say that such was the case, even had such testimony been considered competent.

The decree of the Circuit Court should be modified so as to require Finn to account for his profit on the stock transaction of the Virginia Building and Savings Association, with interest, and to that extent, directions for modification are ordered, otherwise said decree is affirmed.

The Circuit Court is hereby directed to modify its decree as herein provided, otherwise said decree is affirmed and said cause remanded for such modifications.

Decree affirmed in part,
reversed in part and remanded
with directions.

be filed the matter is made the most complete by
attaching thereto the full original document. In cases of
this kind the court is obliged to follow the original
in the same manner as it is in the case of a
copy of the original and not to follow the copy
in the case of a copy of the original.

1. *Journal of the American Medical Association*, 1997; 277: 1001-1005.

1. The first of these is the fact that the
2. second of these is the fact that the
3. third of these is the fact that the

with directions.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

February Term, A. D. 1946

Gen. No. 9488

Agenda No. 7

Millie E. Stombaugh, et al.,)
Plaintiffs-Appellees,)

vs.)

Henry H. Morey, et al.,)
Defendants-Appellants,)

Appeal from the

Circuit Court of

Macon County.

Wheat, J.

323 I.A. 397²

Appellant, Henry H. Morey, has appealed from an order of the Circuit Court of Macon County taxing as costs an allowance of \$1300.00 for Plaintiffs' solicitor's fees in a partition suit in which he was a defendant.

Edward F. Carr, by his Will probated in 1919, left to his wife, Mary Carr, a life estate in the real estate in question, with remainder to his daughter, Millie Stombaugh, and his son, J. Arthur Carr. Mary Carr, the widow, died on November 18, 1942, and immediately thereafter, Millie Stombaugh filed the partition suit. In 1937, Henry H. Morey received a sheriff's deed for the one-half interest of J. Arthur Carr, as a result of sale under certain judgments.

In her partition complaint, Millie Stombaugh alleged that through her father's Will, the death of her mother and the sheriff's deed to Morey, that the lands were owned in equal parts by herself and Henry H. Morey. Thereafter, counterclaims were filed by Morey, asking for an accounting

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STATE OF ILLINOIS

COUNTY OF COOK

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as to rents, and by J. Arthur Carr, charging that the sheriff's deed to Morey was void and that he, Carr, was the owner of one-half of such property.

The Circuit Court entered a decree finding that the sheriff's deed to Morey was void and directed that partition should be made between Millie Stombaugh and J. Arthur Carr, but that the latter should pay Morey the amount represented by the judgments. From that decree, Morey prayed an appeal to the Supreme Court, where such decree was reversed and the Circuit Court was directed to enter a decree awarding partition between Millie Stombaugh and Morey in equal shares. (See Stombaugh v. Morey, 388 Ill. 392). This was done and the property subsequently was sold by the Master to Millie Stombaugh for \$22,560.00, following which, the Court allowed solicitor's fees for the attorney of Millie Stombaugh to be taxed as costs. From the order making this allowance, the appeal is before this Court.

Morey's contention is that no attorney's fees should be assessed in the suit as costs, because the suit was not an amicable one; that Morey was required to employ an attorney to protect his interests, and that the attorneys for Millie Stombaugh did not sustain in the Supreme Court her complaint filed in the Circuit Court.

While there is some merit in the contention that Morey was required to employ an attorney to protect his interests, yet it can be said, in general, that the contest was not between the plaintiff and Morey but between Carr and Morey. It is obvious that the ultimate finding as to owner-

[illegible]

ship was exactly as alleged in the complaint. We believe the Supreme Court effectively and conclusively disposed of the questions raised by the defendant in this appeal by its findings in the case of Stombaugh v. Morey, *supra*, wherein, in reply to the prayer of Morey that future proceedings in the partition suit should be based upon his cross-complaint and counterclaim, it was stated, "The complaint filed by Millie Stombaugh set forth the judgment and proceeding by which appellant acquired his deed and alleged he was the owner of all interest devised to J. Arthur Carr. The contest arose between appellee (Carr) and appellant (Morey) by virtue of the counterclaims they filed. Attention is also called to discrepancies in reference to certain unreleased mortgages. These discrepancies as to interests are not sufficient to deprive plaintiff (Stombaugh) from proceeding with the partition under her complaint."

We find that the solicitor for the plaintiff properly set forth the interests of the parties in the complaint for partition, that the Supreme Court directed that the proceedings relating to the sale continue under such complaint, and that the allowance of attorney's fees as costs was discretionary with the Trial Court. There is no technical rule governing the exact apportionment of costs in a partition suit but the Court is required to apportion the costs equitably and no error occurs in taxing costs against the property unless the Trial Court abuses its discretion. (DeMartini v. DeMartini, 385 Ill. 128). We believe the discretion of the Trial Court was not abused in this case in the allowance of attorney's fees as costs against the property and the decree of the Circuit Court is therefore affirmed.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation into the activities of the Communist Party in the United States. The Commission is therefore unable to make any statement regarding the results of its investigation.

[illegible]

In The
APPELLATE COURT OF ILLINOIS
Second District
February Term, A. D. 1946

328 I.A. 398

Gen. No. 10032

Ag 1.

THEODORE ORBAN and ALBIE ORBAN,
Plaintiffs and Appellees,

vs.

CLARENCE MICHAL and JOHN O. STOLL,
Defendants,

JOHN O. STOLL,
Appellant.

Appeal from
Circuit Court,
Lake County.

Bristow J.

This appeal comes to us from the DuPage County Circuit Court where judgment was entered for plaintiffs and against appellant John Stoll in the total sum of \$52,500.00. There was an automobile accident that occurred on State Route 21 1/2 in Lake County on February 23, 1941 wherein Theodore Orban was frightfully injured. Fifty Thousand Dollars (\$50,000.) of the judgment was entered in his behalf. Theodore's wife, Albie, was much less seriously injured. She was awarded Twenty-five Hundred Dollars (\$2,500.) by the jury.

On December 17, 1941, the plaintiffs filed their complaint, naming Clarence Michal as the sole defendant and charging him with operating his automobile negligently in six different respects. He was also charged with wanton and wilful misconduct. To this complaint Clarence Michal, on February 17, 1942, filed a pleading denominated "Answer and Counterclaim," in which he alleged due care on his part and charged plaintiffs with being negligent and also with wanton and wilful misconduct. Defendant Michal claimed damages in the sum of

IN THE
APPELLATE COURT OF ILLINOIS

Second District

February Term, A. D. 1948 3281 A. 328

Geo. H. 1003

1003

Appeal from
Circuit Court,
Lake County.

THEODORE ORBAN and ALBIE ORBAN,
Plaintiffs and Appellants,

vs.

CLARENCE MICHAEL and JOHN O. TOLL,
Defendants,

JOHN O. TOLL,

Appellant.

Exhibit 1.

This appeal comes to us from the Wayne County Circuit Court where judgment was entered for plaintiffs and against appellant John TOLL in the total sum of \$52,800.00. There was an automobile accident that occurred on State Route 21 in Lake County on February 23, 1941 wherein Theodore Orban was frightfully injured. Fifty thousand dollars (\$50,000.) of the judgment was entered in his behalf. Theodore's wife, Albie, was much less seriously injured. She was awarded twenty-five hundred dollars (\$2,500.) by the jury. On November 14, 1941, the plaintiffs filed their complaint naming Clarence Michael as the sole defendant and charging him with operating his automobile negligently in six different respects. He was also charged with wanton and willful misconduct. To this complaint Clarence Michael, on February 17, 1942, filed a pleading denominated "Answer and counterclaim," in which he alleged due care on his part and charged plaintiffs with being negligent and also with wanton and willful misconduct. Defendant Michael claimed damages in the sum of

Five Thousand Dollars (\$5,000.) Plaintiffs answered the counter-claim on March 6th, 1942.

On February 18, 1943 plaintiffs filed their amended complaint, making John D. Stahl a new party defendant. To this amended complaint Michal filed his answer and counterclaim, claiming damage in the sum of Ten Thousand Dollars (\$10,000.) and alleging substantially what was contained in the pleading first filed. John D. Stahl was charged with ~~negligently~~ driving his automobile upon route 21 ~~when~~ when he could not do so with reasonable safety and without ~~not~~ giving any warning of his intention to do so. On April 2, 1943, Stoll filed his answer to the complaint and counterclaim, claiming to be free from negligence. On November 29, 1944 plaintiffs amended their amended complaint increasing the ad damnum to One Hundred Thousand Dollars (\$100,000.) and making the defendant's name to appear correctly, namely John O. Stoll.

This is what happened:- On Sunday afternoon at about four thirty- a clear, dry day- four automobiles were proceeding southward on State Route 21 at a point about four miles south of the Village of Halfday. The highway at that point was paved with concrete and consisted of four lanes of ten feet each. Defendant Stoll in company with Major Templeton of the U.S. Army was driving south from his home in Northbrook enroute to Chicago. He drove his car completely off the pavement onto the west shoulder and stopped and fixed the left side of the hood which had become unfastened. The second car appearing on the scene was that of defendant Clarence Michal. He was driving southward, occupying the west lane, traveling at about twenty miles per hour, and accompanied by his wife who was riding in the front seat with him. The third car was driven by Clarence's brother, George Michal. It was proceeding in the same lane at the same rate of speed and about fifty feet to the rear of his brother. The Michal brothers had come from the summer home of George which was located in McHenry, Illinois, about thirty miles from the scene of the accident. The fourth car, occupied by

Five thousand dollars (\$5,000.) Plaintiff answered the counter-

claim on March 6th, 1943.

On February 18, 1943 plaintiff filed their amended complaint,

making John L. Stahl a new party defendant. To this amended

complaint Michael filed his answer and counterclaim, claiming damage

in the sum of ten thousand dollars (\$10,000.) and alleging sub-

stantially what was contained in the pleading first filed. John L.

Stahl was charged with negligently driving his automobile upon Route

21 W when he could not do so with reasonable safety and without

giving any warning of his intention to do so. On April 8, 1943, Stahl

filed his answer to the complaint and counterclaim, claiming to be

free from negligence. On November 22, 1944 plaintiff amended their

amended complaint increasing the ad damnum to one hundred thousand

dollars (\$100,000.) and making the defendant's name to appear

correctly, namely John L. Stahl.

This is what happened:- On Sunday afternoon at about four

thirty-a clear, dry day-four automobiles were proceeding northward

on State Route 21 at a point about four miles south of the Village

of Halfway. The highway at that point was paved with concrete and

consisted of four lanes of ten feet each. Defendant Stahl in

company with Major Tompkins of the U.S. Army was driving south

from his home in Northbrook enroute to Chicago. He drove his car

completely off the pavement onto the west shoulder and stopped and

fixed the left side of the hood which had become misshapen. The

second car appearing on the scene was that of defendant Michael

Michael. He was driving southward, occupying the west lane,

traveling at about twenty miles per hour, and accompanied by his

wife who was riding in the front seat with him. The third car was

driven by Clarence's brother, George Michael. It was proceeding in

the same lane at the same rate of speed and about fifty feet to the

rear of his brother. The Michael brothers had come from the summer

home of George which was located in McHenry, Illinois, about thirty

miles from the scene of the accident. The fourth car, occupied by

the plaintiffs, was proceeding southward in the inside lane of the second lane from the west. It was being driven by Mrs. Orban, and her husband was seated to her right. Their home was at Round Lake Beach, seventeen miles from the scene of the accident, and their destination that afternoon was Berwyn, Illinois, where a sister of Mrs. Orban's resides.

Mrs. Orban first saw the Michal cars when she was four or five hundred feet north of them. As she was passing the car of Clarence Michal, he turned to the left, whereupon the left front fender of Clarence's car struck the right front fender of the Orban car which "wobbled" down the road and crashed into a tree on the right side of the road. Stoll testified that after he had fixed the hood he climbed back into his car, looked in the rear view mirror, saw traffic coming some two to three hundred feet to the north, flashed a light on the rear ^{of his car,} and proceeded to gradually nudge his way back on to the pavement.

Clarence Michal testified that Stoll's car pulled right on to the pavement, thus necessitating him to swerve suddenly to the left, and that in doing so he struck the Orban car. Clarence's wife, Ellen, testified that ^{Stoll's} ~~Orban's~~ car suddenly got in front of them and that her husband had to swerve sharply to the left. George Michal testified that Stoll pulled out suddenly without giving any warning.

Mr. Orban testified that when his car reached the Clarence Michal's car, the Stoll car turned left in front of it, the Michal car, which ran into his car. He said the Stoll automobile entered onto the pavement at a 45 degree angle. He also said ^{his} ~~the~~ motor raced and car wobbled and struck a tree, and his next consciousness was at the hospital. Albie Orban testified that she did not see the Stoll car at any time, and when the collision with the Michal car occurred, she was thrown against her husband, and her foot seemed to be pressed upon the accelerator, then they hit a tree and she looked down and saw the bone of her ankle "sticking out".

the plaintiffs, was proceeding southward in the inside lane of the second lane from the west. It was being driven by Mrs. Orban, and her husband was seated to her right. Their home was at Round Lake Beach, seventeen miles from the scene of the accident, and their destination that afternoon was Harvey, Illinois, where a sister of Mrs. Orban's resides.

Mrs. Orban first saw the Michael car when she was four or five hundred feet north of the intersection. As she was passing the car of Clarence Michael, he turned to the left, whereupon the left front fender of Clarence's car struck the right front fender of the Orban car which "wobbled" down the road and crashed into a tree on the right side of the road. Stoll testified that after he had fixed the hood he climbed back into his car, looked in the rear view mirror, saw traffic coming some two to three hundred feet to the north, flashed a light on the rear, and proceeded to gradually edge his way back on to the pavement.

Clarence Michael testified that Stoll's car pulled right on to the pavement, thus necessitating him to swerve suddenly to the left, and that in doing so he struck the Orban car. Clarence's wife, Alice, testified that ~~Stoll's~~ car suddenly got in front of them and that her husband had to swerve sharply to the left. George Michael testified that Stoll pulled out suddenly without giving any warning.

Mr. Orban testified that when his car reached the Clarence Michael's car, the Stoll car turned left in front of it, the Michael car, which ran into his car. He said the Stoll automobile entered onto the pavement at a 45 degree angle. He also said the motor raced and car wobbled and struck a tree, and his next consciousness was at the hospital. Alice Orban testified that she did not see the Stoll car at any time, and when the collision with the Michael car occurred, she was thrown against her husband, and her foot seemed to be pressed upon the accelerator, then they hit a tree and she looked down and saw the bone of her ankle "sticking out".

What transpired after the collision must be given some attention. George Michal testified that Stoll was leaving the scene of the accident; that he stopped him with the warning that he was the cause of the accident and should wait for the police; and that Stoll said, "There is nothing the matter with me, to hell with him"; He further testified that Stoll was mumbling, smelled of liquor, and in his opinion was drunk. Ellen Michal testified that her husband Clarence stopped the Stoll car, and that she talked to Stoll. She told him that he had caused the accident and was not going away. His reply to her was that he was on his way to Chicago and "didn't have time to bother with these people". She further related that he "started swearing"; ~~that~~ ^{that} he was blurry-eyed and smelled of liquor; and further said, "I know the man was drunk".

As to this feature of the event, Stoll testified, ~~x~~ that Major Templeton, upon discovering the seriousness of the accident, went to the nearest telephone and called for the police and an ambulance. He admitted that, while waiting for the Major's return, he was sitting in his car and was approached by a man and lady who said he was responsible for the accident, and he replied, ~~that~~ ^{"If} you will examine my tracks on the grass, indicating my gradual approach to the highway, you will see I was in no way responsible." Stoll further testified that he showed the police officer his tracks, gave him his name and other information requested of him by the policeman, whereupon he left the scene of the accident with the officer's permission. He testified that he had one drink before dinner and was not intoxicated.

Russell Bott testified that he was a member of the Deerfield police force and deputy Sheriff of Lake County, and that he came to the scene of this accident as the result of a phone call. He corroborated Stoll's account with respect to the automobile tracks on the shoulder, and said he talked to and observed the defendant and ~~said~~ ^{that} he was not in any way under the influence of liquor.

that transcripts after the collision must be given some attention. George Michael testified that Stoll was leaving the scene of the accident; that he stopped him with the warning that he was the cause of the accident and should wait for the police; and that Stoll said, "There is nothing the matter with me, to hell with him". He further testified that Stoll was drinking, smelled of liquor, and in his opinion was drunk. Michael also testified that her husband claimed stopped the Stoll car, and that she talked to Stoll. She told him that he had caused the accident and was not going away. In reply to her was that he was on his way to Chicago and "didn't have time to bother with these people". She further stated that he "seemed worried". Not he was thirty-year old and smelled of liquor; and further said, "I know the man was drunk".

As to this feature of the event, Stoll testified that Major Templeton, upon discovering the circumstances of the accident, went to the nearest telephone and called for the police and an ambulance. He admitted that, while waiting for the Major's return, he was sitting in his car and was approached by a man and lady who said he was responsible for the accident, and he replied, "It is you who will examine my tracks on the ground, including my footprints approach to the highway, you will see I was in no way responsible". Stoll further testified that he showed the police his tracks, gave him his name and other information requested of him by the police, whereupon he left the scene of the accident with the officer's permission. He testified that he had one drink before dinner and was not intoxicated.

Trammel also testified that he was a member of the Westfield Police Force and deputy sheriff of Lake County, and that he came to the scene of this accident as the result of a phone call. He corroborated Stoll's account with respect to the automobile tracks on the shoulder, and said he failed to and observed the defendant and that he was not in any way under the influence of liquor.

Major Templeton, at the time of the trial, was a Colonel fighting in Europe and did not testify.

On the day of the trial, plaintiffs and defendant Stoll made a motion to dismiss Michal's counterclaim for want of prosecution which was allowed. Not in the presence of the jury, the court interrogated Clarence Michal who said his attorney, Bernard Decker, had quit him because he could not pay his fees. At the close of the plaintiffs' case, their counsel announced in the presence of the jury, "Inasmuch as there is no apparent negligence on the part of Clarence Michal, I ask that he be dismissed as a party defendant to the suit." This motion was allowed.

Stoll offered in evidence the several answers and counterclaims of Clarence Michal filed on February 17, 1942 and February 23, 1943, and explained ^{that} ^{his} ^{Michal} in ~~their~~ pleadings he stated that the Orban car was traveling in excess of sixty miles per hour. The trial court sustained an objection to this offer. Counsel for appellant insisted that the trial court erred in this respect. Appellant advances the theory that such evidence was admissible for the purpose of showing the interest of Clarence Michal. The jury was fully informed of the fact that Clarence Michal had been a defendant and a counterclaimant, and in that respect was vitally interested. There was no foundation laid for his impeachment, and Michal no longer being a party defendant but simply a witness, ^{such} ^{were} pleadings ~~are~~ not admissible to contradict ^{his} ~~their~~ testimony. Harrison v. Thackaberry, 249 Ill. 512.

Needless to say appellant made motions for directed verdict at the close of plaintiffs' case and at the close of all the evidence. It is argued here that the court erred in overruling these motions.

Appellant contends that both plaintiffs were guilty of contributory negligence. To support this argument it is claimed that Mr. Orban should have told his wife that Stoll's automobile was about to enter upon the pavement and caution her to be on the alert. It is further claimed that Mrs. Orban should have seen the

Major Templeton, at the time of the trial, was a Colonel, fighting in Europe and did not testify.

On the day of the trial, plaintiff and defendant still made a motion to dismiss Michael's counterclaim for want of prosecution

which was allowed. Not in the presence of the jury, the court interviewed Clarence Michael who said his attorney, Bernard Becker, had quit him because he could not pay his fees. At the close of the plaintiff's case, their counsel announced in the presence of the jury, "Inasmuch as there is no apparent negligence on the part of Clarence Michael, I ask that he be dismissed as a party defendant to the suit." This motion was allowed.

Stoll offered in evidence the several answers and counterclaims

of Clarence Michael filed on February 14, 1948 and February 25, 1948, and explained in his pleadings that the Ocean car was

traveling in excess of sixty miles per hour. The trial court sustained an objection to this offer. Counsel for appellant insisted that the trial court erred in this respect. Appellant advances the theory that such evidence was admissible for the purpose of showing the interest of Clarence Michael. The jury was fully informed of the fact that Clarence Michael had been a defendant and a counterclaimant, and in that respect was vitally interested. There was no foundation laid for his impeachment and Michael no longer being a party defendant

but simply a witness, his pleadings were not admissible to contradict his testimony. *See* *Wortham v. Theobald*, 248 Ill. 518.

Needless to say appellant made motions for directed verdict at the close of plaintiff's case and at the close of all the evidence. It is argued here that the court erred in overruling these motions.

Appellant contends that both plaintiffs were guilty of contributory negligence. To support this argument it is claimed that Mr. Orban should have told his wife that Stoll's automobile was about to enter upon the pavement and caution her to be on the alert. It is further claimed that Mrs. Orban should have seen the

Stoll automobile, and should have reasonably anticipated that it would turn suddenly in front of the Michal car, and should have anticipated the swerving of the Michal car to the left, and, if she had done so and managed her car with due regard to those conditions, the accident would not have happened. Appellant's counsel cite many cases in support of their argument, but all are clearly distinguishable from the instant case. We do not believe that the court erred in overruling defendant's motions for directed verdict, nor do we believe that the jury was not justified in finding by their verdicts that both plaintiffs were in the exercise of due care for their own safety.

Appellant further contends that the verdicts were excessive, and that the trial court erred in giving certain instructions relating to damages. Instruction number two stated, that it was unnecessary for any witness to have expressed an opinion on the amount of damages, but that the jury could "make such estimate from the facts and circumstances in proof." And in instruction number three this language was used: "in determining the amount of damages, the jury has the right to and should take into consideration all the facts and circumstances as proved by the evidence before them." It will be noted that in neither instruction was the jury's determination of the amount of damages limited to the evidence with reference to damages. In *Garvey v. The Chicago Railways Company*, 339 Ill. 276 a damage instruction contained this language: "In determining the amount of damages * * * have a right to take into consideration all the facts and circumstances you believe are proved by the evidence before you." In condemning the giving of that instruction, but not reversing therefor, the court said: "An instruction which does not require the assessment of damages to be based upon evidence as to damages for which the law allows recovery is improper." (*Illinois Central Railroad Company v. Johnson*, 221 Ill. 42.) We do not believe the appellant is in a position to take advantage of this error in this court.

itself automobile, and should have reasonably anticipated that it would turn suddenly in front of the Michel car, and should have anticipated the swerving of the Michel car to the left, and, if she had done so and managed her car with due regard to these conditions, the accident would not have happened. Appellant's counsel cites many cases in support of their argument, but all are clearly distinguishable from the instant case. We do not believe that the court erred in overruling defendant's motion for directed verdict, nor do we believe that the jury was not justified in finding by its verdict that defendant's negligence was in the exercise of due care for their own safety.

Appellant further contends that the verdict was excessive, and that the trial court erred in giving certain instructions relating to damages. Instruction number two stated that it was unnecessary for any witness to have expressed an opinion on the amount of damages, but that the jury could "make such estimate from the facts and circumstances as proof." And in instruction number three this language was used: "In determining the amount of damages, the jury has the right to and should take into consideration all the facts and circumstances as proved by the evidence before them." It will be noted that in neither instruction was the jury's determination of the amount of damages limited to the evidence with reference to damages. In *Gentry v. The Chicago Railway Company*, 230 Ill. 478 a similar instruction contained this language: "In determining the amount of damages, you have a right to take into consideration all the facts and circumstances you believe are proved by the evidence before you." In considering the giving of that instruction, but not retaining therefore, the court said: "An instruction which does not require the assessment of damages to be based upon evidence as to damages for which the law allows recovery is improper." (Illinois Central Railroad Company v. Johnson, 241 Ill. 421.) We do not believe the appellant is in a position to take advantage of this error in this court.

Before the instructions were read to the jury and out of their presence, the court and counsel for all parties were going over all instructions and this is what transpired-

The Court: "We will first take up the plaintiffs' instructions."

Mr. Runyard: "There is no objection to plaintiff's instructions numbers 1, 2 and 3."

Mr. Runyard: "There is no objection to plaintiffs' instructions numbered 4, 5, 6, 7."

In the case of *Rohrhof v. Schmidt*, 218 Ill. 585, the court said: "It certainly will not be contended that appellant could be permitted to sit by and see the court do things which he claims to be injurious to him and make no objection, and then, upon appeal, assign these same acts as error and have the decree reversed on that ground."

The Supreme Court in *Western Springs Park District v. Lawrence*, 343 Ill. 302, states at page 311: "Even if there was error committed, a party cannot complain of an error which he induced the court to make or to which he consented. *People v. Clements*, 316 Ill. 282; *McKinnie v. Lane*, 230 id. 544; *Glos v. Murphy*, 225 id. 58; *Conness v. Indiana, Illinois and Iowa Railroad Co.*, 193 id. 464; *Oliver v. Oliver*, 179 id. 9; *Smith v. Kimball*, 128 id. 583; 2 R. C. L. 238."

Also in *Kellner v. Schmidt*, 328 Ill. 426, the Court says at page 430: "There is no principle of law more familiar than that a party shall not be permitted to assign for error that which the court has done at his request or with his consent. *Consensus tollit errorem*. (*Nixon v. Nixon*, 268 Ill. 524; *People v. Zimmer*, 238 id. 607; *McKinnie v. Lane*, 230 id. 544; *Sheridan v. City of Chicago*, 175 id. 421; *Cheney v. Ricks*, 168 id. 533; *Smith v. Kimball*, 128 id. 583.)"

As we have indicated, the plaintiff Theodore Orban was terrifically injured. He suffered a fracture of the pelvis, and there was a fracture of the neck of the femur and the pubic bone on the left side. Also he suffered a concussion of the brain and remained in a state of shock and confusion for a long time. There

Before the instructions were read to the jury and out of their presence, the court and counsel for all parties were going over

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Mr. Humphrey: "There is no objection to plaintiff's instructions"

Numbers 1, 2 and 3."

Mr. Humphrey: "There is no objection to plaintiff's instructions"

Numbers 4, 5, 6, 7."

In the case of *Robinson v. Schmidt*, 218 Ill. 325, the court said:

"It certainly will not be contended that appellant could be permitted to sit by and see the court do things which he claims to be injurious to him and make no objection, and then, upon appeal, assign these same acts as error and have the decree reversed on that ground."

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223 Ill. 325, states at page 311: "Even if there was error committed,

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Indiana, Illinois and Iowa Railroad Co., 195 Ill. 444; *Oliver v.*

Oliver, 173 Ill. 9; *Smith v. Kinross*, 128 Ill. 325; *R. C. R. 238."*

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507; *McKinzie v. Lane*, 230 Ill. 544; *Cherish v. City of Chicago*,

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128 Ill. 325."

As we have indicated, the plaintiff Theodore Cohen was

terribly injured. He suffered a fracture of the pelvis, and

there was a fracture of the neck of the femur and the right bone

on the left side. Also he suffered a concussion of the brain and

remained in a state of shock and confusion for a long time. There

was a contusion of his stomach which the doctor said necessitated an operation wherein eight inches of the small intestine were removed. During the period of hospitalization his condition was pronounced critical for several weeks. Many blood transfusions were given. During the first four months of his illness, his weight dropped from 155 pounds to 87 pounds. In September, 1941, Orban went home from the hospital, but from that time until May, 1944 he was confined to his home, and for a greater portion of that time was in bed. By May, 1944, the left leg atrophied, shrivelled, and shortened until it was four and one-half inches shorter and two-thirds the size of his right limb. At the time of the accident Mr. Orban was 48 years of age, and during the year prior thereto earned \$3,700.00 as a tool maker. The evidence abundantly shows Orban to be a complete physical wreck. We do not believe \$50,000.00 was excessive.

The court in passing on defendant's motion for a new trial used the following language: "The verdict is so high and there is some other peculiar circumstances about the case, particularly that this defendant was not made a party until four days before the two years had expired, and the other defendant being later dismissed out of the case the last moment. It is a peculiar case. However, I cannot grant a new trial just because a case is peculiar, I must have some alleged grounds for granting a new trial." We agree with the court that this is indeed a peculiar case. Indeed it is so strangely peculiar that we believe that justice demands that this case be retried.

The testimony of the two Michal families is so inherently improbable and contradictory that it is worthy of little belief. Clarence Michel, in February, 1942, was a defendant. Later he filed his counter-claim, claiming damages in the sum of \$10,000.00, and charging the Orbans solely, with causing his injuries. He specified in his plead-

was a continuation of his stomach which the doctor said necessitated an operation wherein eight inches of the small intestine were removed. During the period of hospitalization his condition was pronounced critical for several weeks. Many blood transfusions were given. During the first four months of his illness, his weight dropped from 155 pounds to 87 pounds. In September, 1941, Orban went home from the hospital, but from that time until May, 1942 he was confined to his home, and for a greater portion of that time was in bed. By May, 1942, the left leg atrophic, shriveled, and shortened until it was four and one-half inches shorter and two-thirds the size of his right leg. At the time of the accident Mr. Orban was 48 years of age, and during the year prior thereto earned \$7,500.00 as a tool maker. The evidence conclusively shows Orban to be a complete physical wreck. We do not believe \$50,000.00 was excessive.

The court in passing on defendant's motion for a new trial used the following language: "The verdict is so high and there is some other peculiar circumstances about the case, particularly that this defendant was not made a party until four days before the two years had expired, and the other defendant died before the trial out of the case the last moment. It is a peculiar case. However, I cannot grant a new trial just because a case is peculiar, I must have some alleged grounds for granting a new trial." We agree with the court that this is indeed a peculiar case. Indeed it is so strongly peculiar that we believe that justice demands that this case be retried.

The testimony of the two Michael witnesses is so inherently incredible and contradictory that it is worthy of little belief. Clarence Michael, in February, 1942, was a defendant. Later he filed his counterclaim, stating damages in the sum of \$10,000.00, and charging the Orban family with causing his injuries. He testified in his plead-

ing six different respects in which the Orbans were careless. Yet, appellant Stoll was not brought into the picture for almost two years. Then we find at the time of the trial that Clarence Michal discontinued being a defendant and counterclaimant, and suddenly became a very willing witness for the plaintiff and against the defendant Stoll. Clarence no longer was of the opinion that the Orbans were at fault; that they were driving their car at a speed in excess of sixty miles per hour; that they were negligent in the several respects as he had previously indicated in his counterclaim, But, he suddenly, after a lapse of several years, and by some "peculiar" process concludes that Stoll was the guilty one, Why he would not do so at the earliest possible moment is no doubt one of the peculiar aspects of the case that the Court had in mind when he made his pronouncement.

Can you visualize that, if a drunken driver were to turn sharply in front of you into your lane of traffic causing you to suddenly turn into and collide with a third car, you would first blame the driver of the third car for causing the accident instead of the drunken driver who ~~t~~urned sharply in front of you?

On the day of the trial, the entire Michal family displayed themselves as hostile, bitter and biased witnesses against Stoll. The testimony of George and Ellen Michal in particular are replete with volunteered conclusions that were calculated to create strong feeling against defendant Stoll. They were anxious and willing witnesses, seeking at every opportunity to leave with the jury the impression that Stoll was drunk, endeavoring to flee and leave the scene of the accident; that he used profanity when he was sought to remain and take an interest in the injured persons. The only disinterested witness was the policeman who testified that Stoll was not under the influence of liquor in the least. It does not seem reasonable that the officer would have released him so promptly had he been

the six different respects in which the Ordans were careless. Yet, excellent Stoll was not known at the time for almost two years. Then we find at the time of the trial that Clarence Michael had continued being a defendant and counter-defendant, and evidently became a very willing witness for the plaintiff and against the defendant Stoll. Clarence no longer was of the opinion that the Ordans were at fault; that they were driving their car at a speed in excess of sixty miles per hour; that they were negligent in the several respects as he had previously pointed out in his counter-statement. But, he suddenly, after a lapse of several years, and by some "occult" process concludes that Stoll was the guilty one. Why he would do so at the earliest possible moment is no secret and the peculiar aspects of the case that the Court had in mind when he made his pronouncement.

Can you visualize to it, if a drunken driver were to turn sharply in front of you into your lane of traffic causing you to narrowly turn into and collide with a third car, you would first place the driver of the third car for causing the accident instead of the drunken driver who turned sharply in front of you?

On the day of the trial, the entire "good family" immediately themselves as hostile, either as biased witnesses against Stoll. The testimony of George and Ellen Michael in particular are replete with unnumbered conclusions that were calculated to create strong feelings against defendant Stoll. They were anxious and willing witnesses, seeking every opportunity to leave with the jury the impression that Stoll was drunk, and was to blame for the accident scene of the accident; that he had responsibility when he was sought to remain and take a part in the inquiry before. The only statement that witness was the policeman who testified that Stoll was not under the influence of liquor in the least. It does not seem reasonable that the officer would have related him to properly in the case.

in a state of intoxication as described by the Michals. The policeman was certainly in a position to know, and it was his business to know if Stoll was intoxicated. He walked and talked with Stoll, and he was shown the tracks that his car had made on the grass shoulder as he had gradually "nudged" his way back onto the pavement. The tracks showed no abrupt, forty-five degree turning of his car.

The plaintiffs' case was almost wholly dependent upon the testimony of the Michals families. Inherent in the testimony of Clarence Michal are so many improbabilities and contradictions that its falsity is demonstrated. His story, as related on the witness stand when considered in light of his declarations made previously, is quite contradictory to the laws of universal human experience, and is beyond the limits of human belief. The other Michal witnesses were doubtlessly under the domination of Clarence Michal, and their credibility consequently loses its weight. The jury was never told about the inconsistent and contradictory positions taken by Clarence Michal in his pleadings and his testimony. Foundation for his impeachment should have been laid. Upon a retrial this will doubtlessly not be overlooked.

In view of the unsatisfactory character of the proof offered on behalf of the plaintiffs, and in view of the convincing character of the direct and positive proof of a completely disinterested witness offered on behalf of the defendant, we have reached the conclusion that the verdicts in this case are contrary to the manifest weight of the evidence.

Cause reversed and remanded for new trial.

REVERSED AND REMANDED

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man was certainly in a position to know, and it was his business to
know if Stoll was intoxicated. He walked and talked with Stoll, and
he was shown the tracks that his car had made on the grass shoulder
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previously, is quite contradictory to the laws of universal human
experience, and is beyond the limits of human belief. The other
Michael witnesses were doubtlessly under the domination of Clarence
Michael, and their credibility consequently loses its weight. The
jury was never told about the inconsistent and contradictory pos-
sibilities taken by Clarence Michael in his depositions and his testimony.
Foundation for his impeachment should have been laid. Upon a retrial
this will doubtlessly not be overlooked.

In view of the unsatisfactory character of the proof offered on
behalf of the plaintiff, and in view of the convincing character
of the direct and positive proof of a completely disinterested
witness offered on behalf of the defendant, we have reached the
conclusion that the verdict in this case are contrary to the
sanest weight of the evidence.

Case retried and remanded for new trial.

REVEREND AND REMANDED

Gen. No. 10052

Abstract

79.10

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1945

328 I.A. 399

CHICAGO TITLE AND TRUST COMPANY)
AS TRUSTEE UNDER TRUST NO. W)
19162,)
Plaintiff,)
vs)
A. L. WALKER, APPELLEE and)
CARL WENDLEY, APPELLANT,)
DEFENDANTS.)

Appeal from Circuit Court
Du Page County

20930

Bristow, J.

* * * * *

In the Circuit Court of Du Page County, the Chicago Title and Trust Company as trustee under Trust No. W 19162 filed an interpleader proceeding wherein it was claimed that A. L. Walker, appellee, and Carl Wendley, appellant, were real estate agents, both claiming to be the procuring cause of the sale of certain real estate to William Rapp and Evelyn Rapp, his wife. The Chicago Title and Trust Company deposited six hundred Two Thousand/thirty one dollars and twenty cents (\$2631.20) with the clerk of the Circuit Court, and prayed the court that appellant and appellee be made parties defendant; that they be required to file their respective answers setting forth their claims to this real estate commission; and that there be entered an injunction restraining Walker from prosecuting a certain suit that he had instituted in the Circuit Court of Du Page County wherein he sought recovery of his commission. This injunction was granted and made permanent, and the answers of appellant and appellee were filed, and trial was had without a jury. The trial court entered a finding and judgment for appellee Walker for the sum of money deposited by the Chicago Title and Trust Company.

Gen'l. No. 10027

IN THE
 APPELLATE COURT OF ILLINOIS
 SECOND DISTRICT
 October Term, A. D. 1918

328 I.A. 399

Appeal from Circuit Court
 in Pike County

CHICAGO TITLE AND TRUST COMPANY
 AS TRUSTEE UNDER TRUST NO. 10182,
 1918,
 Plaintiff,
 vs
 A. L. WALKER, APPELLEE and
 CARL VANDERLEY, APPELLEE,
 DEFENDANTS.

Brisson, J.

In the Circuit Court of Pike County, the Chicago Title and Trust Company's trustee under Trust No. 10182 filed an application for appointment of a receiver in and to the premises, and Carl Vanderley, appellant, thereupon set the same aside, both parties claiming the property of the same of certain real estate in Pike County and certain real estate in the Chicago Title and Trust Company's possession. The Chicago Title and Trust Company deposited with the clerk of the Circuit Court, and prayed the court that it be appointed receiver of the premises, and that they be required to file their respective answers setting forth their claims to this real estate possession; and that there be entered an injunction restraining Walker from prosecuting a certain suit that he had instituted in the Circuit Court of Pike County wherein he sought recovery of his constitution. This injunction was granted and made permanent, and the answer of appellant and appellee were filed, and trial was had without a jury. The trial court entered a finding and judgment for appellee, and for the sum of money deposited by the Chicago Title and Trust Company.

A Mrs. Heineman, who lived in Hinsdale, Illinois, owned a life estate in a business property, which property after her death was sold to the Rapps. This real estate was located in Hinsdale, and shall be referred to hereafter in this opinion as the Walgreen property. Next to this property, there was located the Oswald building. In this Oswald building Rapp conducted a bakery business, and on the second floor of it Walker had his offices where he conducted his real estate business. Walker had been a resident of the village of Hinsdale for more than twenty years, and throughout this period was a duly licensed real estate broker. He was the managing agent of the Oswald building, and in that capacity had many business transactions with Rapp. Walker also sold Rapp's residence to him in the Village of Hinsdale.

Walker's testimony concerning his dealings with Rapp in the instant case runs as follows. Some time during the year 1943, Rapp came to Walker's office and stated that inasmuch as his bakery business was proving quite profitable he was accumulating some surplus money which he desired to invest, and that he was thinking of buying a business building, and asked Walker to see what he could find for him. Walker told him that the Oswald building had been for sale and that the price was around \$40,000. Rapp's reply was that it was something to think about, and asked what else he had to offer. Walker and Rapp talked of several other pieces of property that might be purchased and the prices that might be considered. Then Mr. Rapp inquired about the Walgreen property, and Mr. Walker's reply was that Mrs. Heineman had a life estate in said property, and that it would not be ready for the market until and after her death. After this lengthy discussion, Rapp told Walker that he would look over some of these properties and would talk to him later.

A Mrs. Heinenman, who lived in Hinsdale, Illinois, owned a life estate in a business property, which property after her death was sold to the Rapp. This real estate was located in Hinsdale, and shall be referred to hereafter in this opinion as the Walgreen property. Next to this property, there was located the Oswald building. In this Oswald building Rapp conducted a bakery business, and on the second floor of it Walker had his offices where he conducted his real estate business. Walker had been a resident of the village of Hinsdale for more than twenty years, and throughout this period was duly licensed real estate broker. He was the managing agent of the Oswald building, and in that capacity had many business transactions with Rapp. Walker also sold Rapp's residence to him in the Village of Hinsdale. Walker's testimony concerning his dealings with Rapp in the instant case runs as follows. Some time during the year 1927, Rapp came to Walker's office and stated that inasmuch as his bakery business was proving quite profitable he was accumulating some surplus money which he desired to invest, and that he was thinking of buying a business building, and asked Walker to see what he could find for him. Walker told him that the Oswald building had been for sale and that the price was around \$40,000. Rapp's reply was that it was something to think about, and asked what else he had to offer. Walker and Rapp talked of several other classes of property that might be purchased and the prices that might be considered. Then Mr. Rapp inquired about the Walgreen property, and Mr. Walker's reply was that Mrs. Heinenman had a life estate in said property, and that it would not be ready for the market until after her death. After this lengthy discussion, Rapp told Walker that he would look over some of these properties and would talk to him later.

Walker further testified that Rapp came to him some time in October in 1943, and expressed an interest in the purchase of the Oswald building, but Walker told him that it had already been sold to another baker named Carney who lived in La Grange, Illinois. Rapp on this visit indicated that he desired Walker to continue to try to find a building investment for him. Walker further testified that Rapp's next visit to his office was in December, 1943 wherein Rapp told him that he was very much concerned about his lease; that inasmuch as the new purchaser of the Oswald building was also a baker, he might want to take possession of the premises and not renew his lease which only had a short time to run. Walker obtained for Rapp a five year lease dated December 15, 1943.

Later on in December, 1943, Mrs. Hieneman died, and on the 19th day of that month Mr. Corbin of the Chicago Title and Trust Company called Walker on the phone and engaged him to manage the Walgreen property. On the same day Walker phoned Rapp and asked him to come to his office, which Rapp did. Walker told him of Mrs. Heineman's death, and that he was assuming the management of the building, and that he was of the opinion that it could be purchased and asked Rapp if he was still interested in such a proposition. Rapp inquired as to what the price would be and asked if there were other persons interested in buying it, and requested Walker to keep in touch with him regarding the same.

Mr. Corbin came out to see Walker on the 21st of December, 1943, and brought with him the management contract. At that time Corbin asked Walker if he knew of anybody that might be interested in the purchase of the Walgreen property, whereupon Walker gave him the names of Rapp, Laue, Davidson, and Reinke. Corbin at that time told Walker that he was not sure as to what the price would be, but he thought that it could be purchased for \$60,000 to \$65,000. Corbin and Walker then had a discussion about the sales of other properties of like character in that vicinity, and Corbin upon leaving requested Walker to attempt to find a purchaser.

Walker further testified that Rapp came to him some time in October in 1943, and expressed an interest in the purchase of the Oswald building, but Walker told him that it had already been sold to another baker named Carney who lived in La Grange, Illinois. Rapp on this visit indicated that he desired Walker to continue to try to find a building investment for him. Walker further testified that Rapp's next visit to his office was in December, 1943 wherein Rapp told him that he was very much concerned about his lease; that inasmuch as the new purchaser of the Oswald building was also a baker, he might want to take possession of the premises and not renew his lease which only had a short time to run. Walker obtained for Rapp a five year lease dated December 15, 1943. Later on in December, 1943, Mrs. Wiseman died, and on the 15th day of that month Mr. Corbin of the Chicago Title and Trust Company called Walker on the phone and engaged him to manage the Walker property. On the same day Walker showed Rapp and asked him to come to his office, which Rapp did. Walker told him of Mrs. Wiseman's death, and that he was seeking the management of the building, and that he was of the opinion that it could be purchased and asked Rapp if he was still interested in such a position. Rapp indicated to him that the price would be low and asked if there were other persons interested in buying it, and requested Walker to keep in touch with him regarding the same. Mr. Corbin came out to see Walker on the 21st of December, 1943, and brought with him the management contract. At that time Corbin asked Walker if he knew of anybody that might be interested in the purchase of the Walker property, whereupon Walker gave him the names of Rapp, Lane, Davison, and Reinke. Corbin at that time told Walker that he was not sure as to what the price would be, but he thought that it could be purchased for \$50,000 to \$55,000. Corbin and Walker then had a discussion about the sale of other properties of like character in that vicinity, and Corbin upon leaving requested Walker to attempt to find a purchaser.

Walker further testified that on that same day, he telephoned Rapp to come to his office. Whereupon, he related to him all the conversation he had had with Corbin. Rapp replied that the price was ridiculous; that no one would pay so much for such an old building. Rapp said he wanted to see the leases, and that he would like to know the cost of maintaining the building and the taxes. On December 23rd, Mr. Corbin came to Walker's office and brought all the leases except the one on the premises occupied by Walgreen. Walker told Corbin that that was the one that Rapp, a prospective purchaser, was interested in seeing, and that he would like to have it in his office soon for Rapp's inspection. On that day Mr. Corbin and Mr. Walker visited all the tenants in the Walgreen property and notified them of the change in management. On the same day, Walker requested Rapp to come to his office again. On this occasion Rapp inspected the leases and inquired about the one with Walgreens, whereupon it was explained that it would be available in a few days. Rapp stated at that time that the rentals should be increased considerably. Mr. Corbin sent by mail the Walgreen lease to Walker on December 31, 1943. So, on January 4, 1944, Rapp was again called to Walker's office when he was shown the Walgreen lease which contained a rental figure of \$250. On this visit Walker and Rapp discussed the taxes, insurance and heating cost. Also, on this occasion Rapp informed Walker that he was not in a position at that time to make an offer inasmuch as he was not sure about his draft status; that in the event his classification was changed and he should be inducted into military service, he would not want to undertake such a big deal.

Throughout the month of January, 1944, Mr. Rapp and Mr. Walker had several interviews on this subject. At one of them Mr. Rapp stated that he would not pay more than \$45,000 for the property, and that he was still unwilling to make an offer. He

Walker further testified that on that same day, he tele-
phoned Rapp to come to his office. Henderson, he related to him
all the conversation he had had with Corbin. Rapp realized that
the price was ridiculous; that no one would pay so much for such
an old building. Rapp said he wanted to see the lessee, and that
he would like to know the cost of maintaining the building and
the taxes. On December 22nd, Mr. Corbin came to Walker's office
and brought all the leases except the one on the premises occupied
by Walker. Walker told Corbin that that was the one that Rapp,
a prospective purchaser, was interested in seeing, and that he would
like to have it in his office soon for Rapp's inspection. On that
day Mr. Corbin and Mr. Walker visited all the tenants in the building
property and notified them of the change in management. On the
same day, Walker telephoned Rapp to come to his office again. On
this occasion Rapp indicated the lessee and inquired about the one
with Walker, whereupon it was explained that it would be avail-
able in a few days. Rapp stated at that time that the building
should be improved or altered by Mr. Corbin and by mail the
Walker came to Walker on December 21, 1934, at 10 o'clock,
1934, Rapp was again called to Walker's office where he was shown
the various leases which contained a clause of reversion. In
this visit Walker and Rapp discussed the taxes, insurance and heat-
ing cost. Also, on this occasion Rapp indicated that he
was not in a position at that time to make an offer inasmuch as
he was not sure about his first status; that in the event his clas-
sification was changed and he should be inducted into military
service, he would not want to undertake such a big deal.
Throughout the month of January, 1934, Mr. Rapp and
Mr. Walker had several interviews on this subject. At one of these
Mr. Rapp stated that he would not pay more than \$45,000 for the
property, and that he was still unwilling to make an offer. He

also asked Walker to give him an opinion as to what he could obtain for his residential property, and Walker replied, "\$11,000 or \$12,000."

On January 28th, Walker wrote the Chicago Title and Trust Company submitting an offer by a Mr. Laue. This was rejected by a letter from a Mr. Peterson who held the title as head of the sales department. It is claimed by Carl Vendley, appellant, that Corbin was attached to the managing rather than the sales department, and that he had no authority to employ Walker to sell the property in question. Walker offered in evidence the letter referred to above from Peterson which reads as follows: "We hope you will be successful in submitting an acceptable offer for this property. Licensed brokers will be entitled to commissions at the Chicago Real Estate Board rate only after offers submitted by them have been accepted in writing by us and sales completed." We agree with Walker's contention that giving consideration to this letter and all the facts and circumstances adduced on the subject, Walker was fully authorized to sell the property in question and expect the usual commission if he was successful.

During the month of March, 1944, Rapp and Walker discussed the same subject, but with no different result. Mr. Walker further testified that on one of Corbin's many visits to his office, Mr. Corbin had pointed out to him Mr. Rapp as the man who might buy the building, and Mr. Corbin is alleged to have said, "The man in overall?", and Mr. Walker replied, "Yes, he wears them in his bakery business." Again in April, 1944, Rapp came to Walker's office and examined the leases, and inquired if a change in the heating plant would not effect a reduction in the heating cost. Mr. Walker advised Mr. Rapp that the heating engineer of the Chicago Title and Trust Company, a Mr. Cartland, had recommended such an improvement. Rapp told Walker then that he thought he would be able to make an off soon; that he would be able to successfully negotiate the deal

also asked Walker to give him an opinion as to what he could obtain for his residential property, and Walker replied,

"\$11,000 or \$12,000."

On January 28th, Walker wrote the Chicago Title and Trust

Company submitting an offer by a Mr. Lane. This was rejected by

a letter from a Mr. Peterson who held the title as head of the sales department. It is claimed by Carl Venfley, appellant, that

Gordin was attached to the managing rather than the sales depart-

ment, and that he had no authority to employ Walker to sell the

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red to above from Peterson which reads as follows: "Now you

will be successful in submitting an acceptable offer for this pro-

perty. Licensed brokers will be entitled to commissions at the

Chicago Real Estate Board rate only after offers submitted by them

have been accepted in writing by us and sales completed." It

agrees with Walker's contention that giving consideration to this

letter and all the facts and circumstances adduced on the subject,

Walker was fully authorized to sell the property in question and

expect the usual commission if he was successful.

During the month of March, 1924, Rapp and Walker discussed

the same subject, but with no different result. Mr. Walker further

testified that on one of Gordin's many visits to his office, Mr.

Gordin had pointed out to him Mr. Rapp as the man who might buy

the building, and Mr. Gordin is alleged to have said, "The man in

overalls," and Mr. Walker replied, "Yes, he wears them in his battery

business." Again in April, 1924, Rapp came to Walker's office and

examined the papers, and inquired if a change in the heating plant

would not effect a reduction in the heating cost. Mr. Walker ad-

vised Mr. Rapp that the heating engineer of the Chicago Title and

Trust Company, a Mr. Gortland, had recommended an improvement.

Rapp told Walker that he thought he would be able to make an

offer soon; that he would be able to successfully negotiate the deal

without selling his residential property inasmuch as his business was improving; and that he had some financial backing.

It was in June, 1944 that Mr. Rapp and one of his employees named Schmidt came to Walker's office and discussed a matter involving Schmidt and an attorney from Downers Grove by the name of Carlson. It seems that Rapp disliked Walker's attitude in the matter and made this statement, "I will have no more business with you; this is going to be unprofitable, and I will do no more business with you at all." This concluded Walker's relationship with Rapp. A reading of the record discloses that the foregoing substantially details most of the dealings between Walker and Rapp as testified to by Walker. There were a few other visits and interviews and incidents, a recitation of which would unduly lengthen this opinion without serving any helpful purpose.

Rapp took the stand on behalf of appellant, Carl Vendley, and testified that he never discussed with Walker the subject of the Walgreen property in his life. Rapp testified that he first learned that the property in question might be for sale in April or May, 1944, and that he gained such information from William Laue, a plumber in Hinsdale. He further testified that it was not until the latter part of June, 1944 that he finally learned of his deferment by his draft board; that up till that time he had no interest in purchasing any property; that then he went to call on Mrs. Heineman and found that she was not at home; that upon telephoning Mrs. Heineman's residence, he was informed by Pearl Dumphy that Mrs. Heineman had died,^{she} and referred him to the Chicago Title and Trust Company when he inquired concerning the status of the Walgreen property.

Rapp further testified that he called John Kavenaugh, his personal attorney, who introduced him to Carl Vendley; that Vendley interviewed Rapp some time in August; and that it was through him solely that he acquired information about the Walgreen building, and also through him that after several offers the building was finally purchased for the sum of fifty five thousand dollars (\$55,000).

without selling his residential property inasmuch as his business was improving; and that he had some financial backing.

It was in June, 1944 that Mr. Rapp and one of his employees named Schmidt came to Walker's office and discussed a matter involving Schmidt and an attorney from Downers Grove by the name of Carlson. It seems that Rapp disliked Walker's attitude in the matter and in this statement, "I will have no more business with you; this is going to be unprofitable, and I will do no more business with you at all." This concluded Walker's relationship with Rapp. A reading of the record discloses that the foregoing substantially details most of the dealings between Walker and Rapp as testified to by Walker. There were a few other visits and interviews and incidents, a recitation of which would hardly result in this opinion without serving any helpful purpose.

Rapp took the stand on behalf of appellant, Carl Venable, and testified that he never discussed with Walker the subject of the Walker property in his life. Rapp testified that he first learned that the property in question might be for sale in April or May, 1944, and that he gained such information from William Lane, a plumber in Hinsdale. He further testified that it was not until the latter part of June, 1944 that he finally learned of his interest in the property; that up till that time he had no interest in purchasing any property; that then he went to call on Mr. Heineman and found that she was not at home; that upon telephoning Mrs. Heineman's residence, he was informed by Pearl Gundry that Mrs. Heineman had died, and that he was to the Chicago Title and Trust Company when he received the notice of the death of Mrs. Heineman.

Rapp further testified that he called John Kavanagh, his personal attorney, who introduced him to Carl Venable; that Venable interviewed Rapp some time in August; and that it was through him solely that he acquired information about the Walker building and its location and that after several offers the building was finally purchased for the sum of fifty five thousand dollars (\$55,000).

Pearl Dumphy corroborated the testimony of Rapp that he telephoned the Heineman home and made inquiry about Mrs. Heineman and the property in question. Walker is corroborated in his testimony in several particulars by two witnesses namely, Mary Hanson and Iona Jeffery who were stenographers employed in Walker's office at various periods during the alleged negotiations between Walker and Rapp. It appears that Mary Hanson who had been regularly employed as Walker's stenographer became a mother some time in November, and that immediately prior thereto and for several weeks thereafter she was in his office only irregularly.

Leon D. McKendry was called as a witness on behalf of defendant Vendley. It appears from his testimony that he was one of the vice-presidents of the Chicago Title and Trust Company, and that he is a manager of the department that supervises sales of property. He testified that the sale of the Walgreen property was made through Mr. Vendley for the sum of \$55,000; that Mr. Peterson, who had written Mr. Walker, was also in the sales department; and that in view of the correspondence between Peterson and Walker, Walker could rightfully assume that he was employed to sell the property in question.

Franklin N. Corbin, testifying on behalf of Vendley, testified that his duties with the Chicago Title and Trust Company pertained to the supervision of real estate, the collection of rents, and the maintenance of the property. His testimony in the main corroborated that of Mr. Walker with the exception that he did not remember the incident of having had Mr. Rapp pointed out to him as a prospective purchaser of the Walgreen property.

We believe that the foregoing fairly outlines the testimony adduced on behalf of the parties hereto, Walker and Vendley. It is obvious that there is sharp conflict in the testimony of the two. It is utterly irreconcilable. One of them certainly committed rank perjury. The trial court, by his findings, has placed that stigma upon Rapp. Giving consideration to all the authorities

Franklin D. Murphy corroborated the testimony of Ray that he telephoned the Hainemann home and made inquiry about Mrs. Hainemann and the property in question. Walker is corroborated in his testimony in several particulars by two witnesses namely, Mary Hanson and Lora Jeffery who were stenographers employed in Walker's office at various periods during the alleged negotiations between Walker and Ray. It appears that Mary Hanson who had been previously employed as Walker's stenographer became a mother some time in November, and that immediately prior thereto and for several weeks thereafter she was in his office only irregularly. When D. McNamara was called as a witness on behalf of defendant Ray, it appears from his testimony that he was one of the vice-presidents of the Chicago Title and Trust Company, and that he was a manager of the department that supervises sales of property. He testified that the sale of the Hainemann property was made through Mr. Venable for the sum of \$55,000; that Mr. Peterson, who had written Mr. Walker, was also in the sales department; and that in view of the correspondence between Peterson and Walker, Walker could rightfully assume that he was employed to sell the property in question.

Franklin N. Gordon, testifying on behalf of Venable, testified that his duties with the Chicago Title and Trust Company pertained to the supervision of real estate, the collection of rents, and the maintenance of the property. His testimony in the main corroborated that of Mr. Walker with the exception that he did not remember the incident of having had Mr. Ray point out to him a prospective purchaser of the Hainemann property.

It is believed that the foregoing fairly outlines the testimony advanced on behalf of the parties hereto, Walker and Venable. It is obvious that there is no conflict in the testimony of the two. It is utterly irreconcilable. One of them certainly committed perjury. The trial court, by its findings, has placed the blame upon Ray. Giving consideration to all the authorities

cited by both appellant and appellee in their briefs, we are justified in concluding that assuming that there was a valid listing of the property in question by the plaintiff with Walker, and assuming that the trial court placed credence in the testimony of Walker, then the result is irresistible that Walker was the procuring cause of the sale of the Walgreen property and thus entitled to the commission for selling the same.

It appears that Walker was the first person to talk to Rapp about the purchase of this property. It was Walker's efforts that developed in Rapp a desire to buy. "Here a broker is the efficient cause of producing a purchaser who is ready and able to buy upon the terms fixed by the owner, the broker will be entitled to the compensation agreed upon. Groome vs Freyer Engineering Company 374 Ill. 113, 125.

In the case of Francisco vs Coleman, 230 Ill. App. 465, the ~~only~~ plaintiff Francisco was a real estate broker and the defendant Coleman listed with Francisco a farm in DuPage County which was owned by Coleman and other members of his family. This farm was listed with Francisco in November, 1920. On December 9, 1920 Francisco introduced Lee as a prospective purchaser, to the owner. Lee eventually bought the farm by contract made January 17, 1921 wherein the firm of Stewart & Stockwell acted as the brokers. Francisco brought suit to recover a broker's commission and this court said, page 469: "There is no dispute about Lee having been first produced by the plaintiff and it cannot be seriously doubted that Lee never waivered in his intention to buy the land from the time he looked at it on December 9. It was not necessary for the trial judge to determine just what prompted Lee to endeavor to close the deal through some one else than the plaintiff. It is apparent that he had some purpose which seemed to be sufficient to him. His breaking off of negotiations with the plaintiff and taking them up with another brokerage firm was not the result of any decision on his part not to buy the land. The circumstances surrounding

the commission for selling the same.

It appears that Miller was the first person to talk to Harry about the purchase of the property. It was Miller's effort to develop in Harry a feeling of duty. Harry's father is the efficient owner of over 1000 acres of land and is very old and when the father died of the cancer, the doctor told him that the cancer was a kind of cancer which was never before known.

112, 125.

In the case of Ex parte, 112, 125, the
of Ex parte was a full estate owned and the defendant
Colman lived with Francis a few in 1911, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 8

the transaction were such that the defendant Coleman ought to have known that his agent Francisco was not being ^a fairly treated. Almost from the first he suspected that Stewart & Stockwell's customer was Lee. He was repeatedly admonished by the plaintiff that if the customer turned out to be Lee, he would be asked to pay plaintiff the commissions agreed upon. Coleman saw fit to let the matter drift and closed the deal through his new brokers without making any effort to protect his original agent, who was unquestionably the procuring cause of the sale. Under such circumstances the defendant cannot avoid the payment of the commissions agreed upon. Rigdon vs More, 226 Ill. 382; Ogren vs Sundell, 220 Ill. App. 584; Hafner vs Herron, 165 Ill. 242.

Other Illinois cases supporting the validity of Walker's claim for commission are Wright vs McClintock, 136 Ill. App. 438, 441; Ellis vs Dunaworth, 49 Ill. App. 187, 191.

Vendley was employed by Rapp through his attorney, Kavanaugh. he was apparently engaged to buy the Walgreen property for Rapp as cheaply as possible. No doubt Vendley should be compensated for his services, but we believe this to be Rapp's obligation.

In considering the rules of law that must guide this court in evaluating the force of the trial court's finding, it appears to make little difference whether this case shall be considered as one in Chancery or as one in Law. The appellant in his argument seems to favor the view that this case should be reviewed as one tried on the chancery side. The conclusions reached by a chancellor should be sustained by a reviewing court unless they appear to be palpably erroneous. Phillip Carey Manufacturing Co. vs Weygant, 143 App. 297. On the other hand, the finding of the trial court in a law case is not to be disturbed unless it is against the clear and manifest weight of the evidence. McGoorty vs Benhart, 305 Ill. App. 458, 462.

the transaction were such that the defendant Colwell ought to have known that his agent Tranter was not acting fairly and honestly. Almost from the first he suspected that Stewart & Stockwell's counterparty was Lee. He was repeatedly admonished by the plaintiff until that is the statement turned out to be true, he would be asked to pay plaintiff the commission agreed upon. He then saw the defendant let the matter drift and closed the deal through his own broker without making any effort to correct his original error, and was undoubtedly the procuring cause of the sale. Under such circumstances the defendant's conduct voids the contract of the commission. Agreed upon. Patton vs. Moore, 188 Ill. App. 2d 100; Moore vs. Patton, 188 Ill. App. 2d 100; Haines vs. Haines, 188 Ill. App. 2d 100.

Other Illinois cases supporting the validity of such a claim for commission are Wright vs. Hollister, 188 Ill. App. 2d 100; Miller vs. Dinsmore, 188 Ill. App. 2d 100.

Vandey was employed by Wright through the attorney, Robert H. He was accordingly entitled to pay the balance of money for Wright as clearly responsible. He must Vandey should be compensated for his services, but we believe this to be Wright's obligation.

In considering the rules of law that must exist in this court in evaluating the force of the trial court's findings, it appears to make little difference whether this case shall be considered as one in Quincy or as one in Ill. The excellent in his argument seems to favor the view that this case should be reviewed on one basis on the arbitrary side. The conclusions reached by a commission should be sustained by a reviewing court unless they appear to be seriously erroneous. Phillips Gray Smith vs. Gray Co. vs. Gray, 188 Ill. App. 2d 100. On the other hand, the finding of the trial court is a fact case and should not be disturbed unless it is manifestly the clear and overwhelming weight of the evidence. Roberts vs. Roberts, 188 Ill. App. 2d 100.

The relationship between Walker and Rapp for more than seven years had been cordial. They occupied the same building, and when Rapp had any real estate problems he enlisted the assistance of Walker. He learned that the Walgreen property--according to his own testimony--was on the market in April or May, 1944. He did not become angry with Walker until the latter part of June, 1944. It seems unreasonable that he would turn to a stranger in the real estate business to help in this transaction rather than go upstairs and see his old friend Walker. Also, Rapp feebly explained his several proven visits to Walker's office during the month of January, 1944 by stating that he went there at that time to secure a continuation of his lease on his bakery property. The evidence discloses, however, that on December 15, 1943, he had already secured that lease.

On the other hand, this observation may be made which lends support to Rapp's version of what transpired in this matter. In June, 1944, Rapp went to see Mrs. Heineman at her residence and found no one at home. Then he telephoned the residence and asked for Mrs. Heineman, and was informed by Mrs. Lumphy that she had passed away in December, 1943. Mrs. Lumphy, an unimpeached and disinterested witness, corroborates Rapp as to the conversation. It does seem strange that Rapp would call for Mrs. Heineman in June, 1944, if he had been told in December, 1943 by Walker that she had passed away.

The trial court saw and heard Rapp and Walker testify. He was in a position to observe their demeanor while testifying. We are confronted here with the long established rule that where there is a conflict in the proof and the facts and circumstances in evidence, by a fair and reasonable intendment, will warrant the finding of the trial court, trying a case without a jury, reviewing courts will reluctantly, if ever, disturb such finding. *Lowry vs*

The relationship between Wilson and Rapp for some time
seven years and some 1911. They occupied the same building, and
when Rapp had any real estate problems he consulted the witnesses
of Wilson. He is found that the witness property--according to his
own testimony--was on the witness in April of 1911. He did not
become friendly with Wilson until the latter part of June, 1911. It
seems unreasonable that he would turn to a stranger in the real
estate business to help him. This is a question which Rapp had to make
and see his old friend Wilson. Then, Rapp testifies that of his
several proven visits to Wilson's office during the period of
January, 1911 by stating that he went there at that time to secure
a confirmation of his lease on his property. The witnesses
testify, however, that on January 15, 1911, he did not
secure that lease.

On the other hand, this investigation has to make which leads
evidence to Rapp's version of what transpired in this matter. In
June, 1911, Rapp went to the real estate office of Wilson and
found on his desk. There he saw Wilson's real estate and lease
for Mrs. Wilson, and was informed by Mrs. Wilson that she had
passed away in December, 1911. When Wilson, in December, 1911,
testified, however, corroborated Wilson's statement in
It does seem strange that Rapp would call for Mrs. Wilson in
June, 1911, if he had been told in December, 1911, of Wilson's
and had passed away.

The trial court was not Rapp and Wilson testifies.
The case is a question to observe Wilson's testimony while testifying.
The court has to make with the fact established rule that where
there is a conflict in the facts and circumstances
in evidence, by fair and reasonable inference, will turn on the
finding of the trial court, trying a case without a jury, making
decide will reasonably. At every, indeed such finding. Rapp vs

Orr, 6 Ill. (1 Gilm) 70, 83; Saxton vs Drake, 191 Ill.App. 322, 325;
Bouslaugh vs Schumacher, 270 Ill.App.79, 83; Morgan vs Ryerson,
20 Ill. 344, 346; Chicago Rock Island R. R. Co. vs Crandall,
41 Ill. App. 234, 235; Wright vs Stinger, 269 Ill. App. 224, 232;
Hart vs Wilson, 177 Ill. App. 510, 511.

The trial court in deciding this case was called upon to search out the truth and determine where the preponderance of the evidence lay between Rapp and Walker. We are only required to determine whether the facts, by fair and reasonable intendment, will warrant the finding of the trial court. We do not believe that the trial court was palpably erroneous nor that we would be warranted in holding that the trial court was manifestly wrong in his finding. The finding of the trial court is hereby affirmed.

JUDGMENT AFFIRMED.

Ort, 6 Ill. 11 (1917) 20, 83; Patton vs Brown, 101 Ill. App. 386, 388;
Bonafant vs Johnson, 177 Ill. App. 7, 83; Warren vs Weaver,
20 Ill. 34, 346; Wilson vs Rock Island R. Co., 24 Ill. 346, 347;
21 Ill. App. 386, 387; Wright vs Johnson, 239 Ill. App. 344, 345;
Hart vs Wilson, 177 Ill. App. 510, 511.

The trial court in declining this case was called upon to
 search out the facts and determine where the preponderance of the
 evidence lay between Rock Island and Wilson. We are only required to
 determine whether the facts, by themselves, justify the finding of
 will or want of the finding of the trial court. We do not say
 that the trial court was properly authorized to find as it did
 warranted in holding that the trial court was manifestly wrong in
 the finding. The finding of the trial court is hereby affirmed.

JOURNAL, ILLINOIS.

app
Jury

Abstract

A

Gen. No. 10047

Agenda No. 2

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS

SECOND DISTRICT

2213

February Term, A.D. 1946.

GUY RIDGON, APPELLEE

v.

HATTIE WAGNER CROSBY,
APPELLANT.

328 I.A. 399²

Appeal from the Circuit
Court of Will County.

Dove, J.

The jury in an automobile accident case in the circuit court of Will County returned a verdict of \$4500.00 in favor of the plaintiff upon which judgment was entered and the defendant has appealed.

The accident occurred about 4 o'clock, P.M. on May 30, 1943, on U. S. Route 66 in Will County at a point where it is crossed by a county aid black top highway known as Caton Farm Road. It was raining and the pavement was wet. Route 66 runs approximately north and south and Caton Farm Road crosses it in a general easterly and westerly direction. Appellant's car, a two and one half ton Cadillac, was coming from the west on Caton Farm Road. She was driving, accompanied by her 84 year old mother. Appellee's car, a two door Chevrolet coach, was coming from the south en route to Elgin, conveying an insane prisoner from the penitentiary at Menard to the State Hospital at Elgin, having previously left another prisoner with the authorities at Champaign.

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS

SECOND DISTRICT

February Term, A.D. 1946.

GUY RIDGON,
APPELLEE

v.

HATTIE WAGNER CROSBY,
APPELLANT.

Appeal from the Circuit
Court of Will County.

328 I.A. 399

Dove, J.

The jury in an automobile accident case in the circuit court of Will County returned a verdict of \$4800.00 in favor of the plaintiff upon which judgment was entered and the defendant has appealed.

The accident occurred about 4 o'clock, P.M. on May 30,

1945, on U. S. Route 66 in Will County at a point where it is crossed by a county aid black top highway known as Gatton Farm Road. It was raining and the pavement was wet. Route 66 runs approximately north and south and Gatton Farm Road crossed it in a general easterly and westerly direction. Appellant's car, a two and one half ton Cadillac, was coming from the west on Gatton Farm Road. She was driving, accompanied by her 84 year old mother. Appellee's car, a two door Chevrolet coach, was coming from the south en route to Elgin, conveying an insane prisoner from the penitentiary at Joliet to the State Hospital at Elgin, having previously left another prisoner with the authorities at Champaign.

Appellee was captain of the guards at the penitentiary. The car was being driven by his friend Raymond Coleman, who lives at Chester, near Menard, and who came on the trip in order to visit some relatives in Chicago. Appellee sat on his right in the front seat and the prisoner occupied the rear seat. The collision occurred about the middle of the intersection of the two highways. Mr. Coleman testified that appellant's car smashed directly into the center of appellee's car, taking the left hand door off, and that he was thrown from the car. After the collision the car he was driving came to a stop about 70 to 80 feet north of the intersection and about 3 feet off the east side of the pavement. The front end of appellant's car was mashed, the frame bent to the left, and when it stopped it was headed west on the north side of Caton Farm Road, with the rear end still on the pavement on Route 66. Appellee was severely injured. Two ribs were broken, he was bleeding at the mouth, suffered numerous contusions, was in a confused condition, and was taken to a hospital, where he remained about ten days. Medical testimony is to the effect that he was suffering from concussion of the brain, and that he was permanently injured as a result of this collision. The repairs to his car cost \$473.21, and his hospital and doctor bills amounted to \$253.00. Appellant's car was so badly injured that no repairs were made and it was junked.

The grounds urged for reversal are that the court erred in giving instructions on behalf of appellee, in admitting testimony of a non-expert witness as to the mental and physical condition of appellee after the accident, that the verdict is against the manifest weight of the evidence, and is excessive in amount.

The testimony as to what happened just before and at the time of the collision is in conflict, and in such case it is essential that the jury be properly instructed. Instruction 7, given at appellee's instance, told the jury that "if you believe from a

Appellee was captain of the guards at the penitentiary. The car was being driven by his friend Raymond Coleman, who lives at Chester, near Ward, and who came on the trip in order to visit some relatives in Chicago. Appellee sat on his right in the front seat and the prisoner occupied the rear seat. The collision occurred about the middle of the intersection of the two highways. Mr. Coleman testified that appellant's car smashed directly into the center of appellee's car, taking the left hand door off, and that he was thrown from the car. After the collision the car he was driving came to a stop about 70 to 80 feet north of the intersection and about 3 feet off the east side of the pavement. The front end of appellant's car was crumpled, the frame bent to the left, and when it stopped it was headed west on the north side of Eaton Farm Road, with the rear end still on the pavement on Route 66. Appellee was severely injured. Two ribs were broken, he was bleeding at the mouth, suffered numerous contusions, was in a confused condition, and was taken to a hospital, where he remained about ten days. Medical testimony is to the effect that he was suffering from concussion of the brain, and that he was permanently injured as a result of this collision. The repairs to his car cost \$478.21, and his hospital and doctor bills amounted to \$353.00. Appellant's car was so badly injured that no repairs were made and it was junked. The grounds urged for reversal are that the court erred in giving instructions on behalf of appellee, in admitting testimony of a non-expert witness as to the mental and physical condition of appellee after the accident, that the verdict is against the manifest weight of the evidence, and is excessive in amount. The testimony as to what happened just before and at the time of the collision is in conflict, and in such case it is essential that the jury be properly instructed. Instruction 7, given at appellee's instance, told the jury that "if you believe from

preponderance of the evidence that the accident in question and resultant injuries to Guy Rigdon if shown by a preponderance of the evidence, were caused by the negligence of the Defendant, Hattie Wagner Crosby, as alleged in the Complaint or some count thereof, and that Guy Rigdon himself was in the exercise of ordinary care for his own safety at and before the time of the injury, then you should find the Defendant guilty."

Where the owner of a car is riding in it, he has not only the right to possession of it but has such possession and he necessarily retains the power and the right of controlling the manner in which it is being driven unless it is shown that he has contracted away or abandoned that right. He likewise has the duty to control the driver. (Palmer v. Miller, 380 Ill. 256, 260). The question of ordinary care on the part of the driver of appellee's car, as well as appellee's own ordinary care, was thus an element of appellee's right to recover. A fatal objection to the 7th instruction, urged by appellant, is that it disregards the element of ordinary care on the part of the driver of appellee's car, and directs a verdict. While an instruction which does not direct a verdict may be cured by other instructions when all of them are considered together as a series, (Chicago City Railway Co. v. Mead, 206 Ill. 174; Chicago Union Traction Co. v. Hawthorn, 211 Ill. 367), it is well settled that where an instruction directs a verdict, all the elements necessary to sustain such a verdict must be contained in the instruction and if such an instruction omits an element necessary for recovery it is not cured by other given instructions and the giving of such an instruction constitutes reversible error. (Hanson v. Trust Company of Chicago, 380 Ill. 194, 197; Illinois Iron and Metal Co. v. Weber, 196 Ill. 526, 531; Chicago and Alton Railroad Co. v. Kuckkuck, 197 Ill. 304; Cantwell v. Harding, 249 Ill. 354, 358; Cromer v. Borders Coal Co., 246 Ill.

preponderance of the evidence that the accident in question was
 resultant injuries to Guy Rigdon is shown by a preponderance of
 the evidence, were caused by the negligence of the defendant,
 Hattie Wagner Crosby, as alleged in the Complaint or some count
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 ordinary care for his safety at and before the time of the
 injury, then you should find the Defendant guilty."

Where the owner of a car is riding in it, he has not
 only the right to possession of it but has such possession and he
 necessarily retains the power and the right of controlling the
 manner in which it is being driven unless it is shown that he has
 contracted away or abandoned that right. He likewise has the duty
 to control the driver. (Palmer v. Miller, 303 Ill. 325, 326.) The
 question of ordinary care on the part of the driver of appellee's
 car, as well as appellee's own ordinary care, was thus an element
 of appellee's right to recover. A fatal objection to the instruction
 given, urged by appellant, is that it disregards the element of
 ordinary care on the part of the driver of appellee's car, and
 directs a verdict. While an instruction which does not direct a
 verdict may be cured by other instructions when all of them are
 considered together as a series, (Chicago City Railway Co. v. Neal,
 308 Ill. 175; Chicago Union Traction Co. v. Hawthorn, 311 Ill. 387),
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 instructions and the giving of such an instruction constitutes
 reversible error. (Hannon v. Trust Company of Chicago, 380 Ill.
 194, 197; Illinois Iron and Steel Co. v. Pease, 196 Ill. 703, 731;
 Chicago and Alton Railroad Co. v. Kucharski, 197 Ill. 304; Gutwell
 v. Harburg, 249 Ill. 354, 358; Greer v. Porters Coal Co., 246 Ill.

451, 457).

Appellant also complains that the instruction is bad because it refers the jury to the allegations of the complaint. Such references to the complaint have been repeatedly criticised by our courts of review, but are generally held not reversible error where the complaint states a complete cause of action, but if the instruction is peremptory and the complaint omits a necessary element of the cause of action, the giving of the instruction is reversible error. (*Krieger v. Aurora, Elgin and Chicago Railroad Co.*, 242 Ill. 544, 551.) In the instant case while the abstract does not disclose whether the complaint alleges that the driver of appellee's car was in the exercise of due care and caution at the time and place of the collision, an examination of the record shows that appropriate allegations in this regard are made. Complaint is also made that this instruction assumes that the plaintiff was injured. As the judgment must be reversed and the cause remanded for a new trial on account of the error first above mentioned, the parties upon such retrial will have an opportunity to have the jury correctly instructed and further consideration of this contention is unnecessary.

The 8th and the 9th given instructions are peremptory in their nature and are subject to the same fatal objection as the 7th instruction. The 9th instruction is also subject to the further objection that it does not limit the damages to those alleged in the complaint. (*Chandler v. Gifford*, 223 Ill. App. 486).

The 4th given instruction is subject to the objection that the jury could understand from it that appellee's car had the right of way at the intersection, regardless of the relative distances of the two cars from it, and their respective speeds. (*Partridge v. Enterprise Transfer Co.*, 307 Ill. App. 386).

The 1st, 3rd, 5th and 10th given instructions omit proper elements, unnecessary to be detailed here, as they can be corrected on a new trial. The 5th instruction also tells the jury that they

Appellant also complains that the instruction is bad because it refers the jury to the allegations of the complaint. Such references to the complaint have been repeatedly criticized by our courts of review, but are generally held not reversible error where the complaint states a complete cause of action, but if the instruction is peremptory and the complaint omits a necessary element of the cause of action, the giving of the instruction is reversible error. (Kriegler v. Ammons, 174 Ill. 2d 111, 84, 551.) In the instant case while the complaint does not disclose whether the complaint alleges that the driver of appellee's car was in the exercise of due care and caution at the time and place of the collision, an examination of the record shows that appropriate allegations in this regard are made. Complaint is also made that this instruction assumes that the plaintiff was injured. As the judgment must be reversed and the cause remanded for a new trial on account of the error first above mentioned, the parties upon such retrial will have an opportunity to have the jury correctly instructed and further consideration of this contention is unnecessary.

The 8th and the 9th given instructions are peremptory in their nature and are subject to the same fatal objection as the 7th instruction. The 9th instruction is also subject to the further objection that it does not limit the damages to those alleged in the complaint. (Graham v. Elford, 250 Ill. 2d 111, 83.)

The 4th given instruction is subject to the objection that the jury could understand from it that appellee's car had the right of way at the intersection, regardless of the relative distances of the two cars from it, and their respective speeds. (Partridge v. Enterprise Transfer Co., 307 Ill. 2d 111, 83.)

The 1st, 2nd, 5th and 10th given instructions are proper elements, unnecessary to be detailed here, as they can be corrected on a new trial. The 6th instruction also tells the jury that they

"should" take into consideration certain elements. A better usage is that they "may" do so. (Rudin v. Wheelock, 249 Ill. App. 249).

Appellant also claims that the trial court erred in admitting the testimony of Mr. Coleman, a non-expert witness as to appellee's mental and physical condition after the accident. The witness testified that he had known appellee for ten years prior to the accident and had lived at his home about six years just before the accident happened; that his physical condition was "all right" and he was healthy and strong before the accident; that in the accident he was "knocked out" and was in a dazed condition which lasted until he was taken to the hospital; that "There is a difference in his condition as to what it was before the accident. He just doesn't seem the same as he used to be. Isn't as cheerful and friendly as he used to be. I can notice a difference in his mind and memory. He doesn't seem to remember things as good as he used to." He further testified that he had seen appellee every few days since the accident up until the time of the trial which occurred on January 31, 1945.

It is well settled that before a non-expert witness is entitled to express an opinion as to the mental capacity of another person he must state sufficient facts and circumstances upon which to base it. The question of whether the facts stated form a sufficient basis for such an opinion is one for the trial court to determine, and unless the court has abused the discretion, the admission of such testimony will not effect a reversal. (Catt v. Robins, 305 Ill. 76, 82; Ergang v. Anderson, 378 Ill. 312, 316). Long and intimate acquaintance and opportunity to observe the person whose mental capacity is the subject of inquiry is sufficient to permit the expression of an opinion as

"should" take into consideration certain elements. A better usage is that they "may" do so. (English v. Wheelock, 249 Ill. App. 249).

Appellant also claims that the trial court erred in admitting the testimony of Mr. Tolman, a non-expert witness as to appellee's mental and physical condition after the accident. The witness testified that he had known appellee for ten years prior to the accident and had lived at his home about six years just before the accident happened; that his physical condition was "all right" and he was healthy and strong before the accident; that in the accident he was "knocked out" and was in a dazed condition which lasted until he was taken to the hospital; that "There is a difference in his condition as to what it was before the accident. He just doesn't seem the same as he used to be. It's an unusual and friendly as he used to be. I can't see a difference in his mind and memory. He doesn't seem to remember things as good as he used to." He further testified that he had seen appellee every few days since the accident up until the time of the trial which occurred on January 31, 1945. It is well settled that before a non-expert witness is

entitled to express an opinion as to the mental capacity of another person he must state sufficient facts and circumstances upon which to base it. The question of whether the facts stated form a sufficient basis for such an opinion is one for the trial court to determine, and unless the court has abused its discretion, the admission of such testimony will not effect a reversal. (Catt v. Apple, 303 Ill. 78, 89; Bryant v. Anderson, 370 Ill. 319, 326). Long and intimate acquaintance and opportunity to observe the person whose mental capacity is the subject of inquiry is sufficient to permit the expression of an opinion as

to his mental capacity by a non-expert witness who states sufficient facts upon which to base such opinion, the weight of the testimony being a question for the jury. (Chicago Union Traction Co. v. Lawrence, 211 Ill. 373; Britt v. Darnell, 315 Ill. 385, 401; Peters v. Peters, 376 Ill. 237, 242, 243; Ergang v. Anderson, 378 Ill. 312). The facts upon which the witness based his opinion were his long, intimate acquaintance with appellee, his frequent contacts with him since the accident, his impaired memory and the difference in his disposition. The plaintiff testified, without objection, to his impaired memory, and Dr. Rooney, who attended him while he was in the hospital, testified that the injury to his brain will and apparently had caused some disturbance in his memory. Dr. Kuhlman, his physician since he left the hospital, testified that he administered phenobarbital in order to make him rest a little better, reduce nervousness, and make him less irritable. We do not think that the error, if any, in admitting the testimony of Mr. Coleman, was prejudicial.

It is unnecessary to pass upon the claims that the verdict is against the manifest weight of the evidence, and that it is excessive. For the errors referred to the judgment of the trial court is reversed and the cause is remanded for a new trial.

Reversed and remanded.

to his mental capacity by a non-expert witness who stated
 sufficient facts upon which to base such opinion, the weight of
 the testimony being a question for the jury. (Chicago Union
 Traction Co. v. Lawrence, 211 Ill. 373; Britt v. Barnett, 315 Ill.
 385, 401; Peters v. Peters, 378 Ill. 337, 342, 343; Eugene v.
 Anderson, 378 Ill. 312). The facts upon which the witness based
 his opinion were his long, intimate acquaintance with appellee,
 his frequent contacts with him since the accident, his impaired
 memory and the difference in his disposition. The plaintiff
 testified, without objection, to his impaired memory, and Dr.
 Rooney, who attended him while he was in the hospital, testified
 that the injury to his brain will and apparently had caused some
 disturbance in his memory. Dr. Kuhlman, his physician since he
 left the hospital, testified that he administered phenobarbital
 in order to make him rest a little better, reduce nervousness,
 and make him less irritable. He do not think that the error,
 if any, in admitting the testimony of Dr. Coleman, was prejudicial.
 It is unnecessary to pass upon the claim that the
 verdict is against the manifest weight of the evidence, and that
 it is excessive. For the errors referred to the judgment of the
 trial court is reversed and the cause is remanded for a new trial.

Reversed and remanded.

Abstract

GENO NO. 10063

AGENDA NO. 5

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1946.

O. A. BROOK,
PLAINTIFF-APPELLANT,

v.

GUY DERRY,
DEFENDANT-APPELLEE.

323 I.A. 400

APPEAL FROM THE
CIRCUIT COURT OF
PEORIA COUNTY

Dove, J.

This cause is here by an appeal from a decree of the circuit court of Peoria County, dismissing for want of equity a complaint in a suit by appellant against appellee for specific performance of a written option executed by appellee's grantor, granting appellant an option for a lease of 160 acres of marsh land in Marshall County for the official duck hunting season of 1944.

Appellant had leased the premises from the owner for the duck hunting season each year from 1936 to 1943 inclusive, the general procedure being to take an option each year for the next duck hunting season. His lease for the 1943 season was preceded by such an option. On October 6, 1943, he procured a written option from Georgiana Y. Palmer, also known as Georgiana Y. Palmer Brown, the owner, for such a lease for the official duck hunting season of 1944, paying her \$30.00 therefor. This option providing for a rental of \$475.00 less the \$30.00 paid in the event the option was exercised. The option provided that it shall be binding

10003

Appellate

AGENDA NO. 2

GEN. NO. 10003

IN THE APPELLATE COURT OF THE

STATE OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1946.

3281A-100

APPEAL FROM THE
CIRCUIT COURT OF
PEORIA COUNTY

O. A. BROOK,
PLAINTIFF-APPELLANT,

v.

GUY DERRY,
DEFENDANT-APPELLEE.

Dove, J.

This cause is here by an appeal from a decree of the circuit court of Peoria County, dismissing for want of equity a complaint in a suit by appellant against appellee for specific performance of a written option executed by appellee's grantor, granting appellant an option for a lease of 160 acres of marsh land in Marshall County for the official duck hunting season of

1944.

Appellant had leased the premises from the owner for the duck hunting season each year from 1936 to 1943 inclusive, the general procedure being to take an option each year for the next duck hunting season. His lease for the 1943 season was preceded by such an option. On October 2, 1943, he procured a written option from Georgiana Y. Palmer, also known as Georgiana Y. Palmer Brown, the owner, for such a lease for the official duck hunting season of 1944, paying her \$30.00 therefor. This option providing for a rental of \$75.00 less the \$30.00 paid in the event the option was exercised. The option provided that it shall be binding

upon the executors, administrators and assigns of the parties.

On January 20, 1944, appellee procured a written lease of the premises from the owner for two years from the date thereof, for a cash rental of \$1700.00 and this lease was recorded on January 21, 1944. The option of appellant was recorded on March 11, 1944. On May 6, 1944, appellee took title to the premises by a warranty deed from the owner, and the deed was recorded on May 8, 1944. Other sportsmen were associated with both appellant and appellee, and interested in the respective leases.

On June 8, 1944 appellant caused to be served on appellee a written notice of his election to exercise his option, with a demand for a lease conformable therewith, and a tender of \$445.00 as the balance of the rent. The constable who served the notice testified that appellee said, with profane expletives, that he had paid several thousand dollars for the property, and to tell Brock that if he caught him up there, he (Derry) would be up there with a shot gun.

The complaint, filed the next day, seeks specific performance of the option and such other relief as shall seem meet. Mrs. Palmer, the former owner, was not made a party to the suit. After an answer and reply thereto were filed the cause was referred to the master in chancery on September 11, 1944 and hearings before him were concluded on October 4, 1944. Thereafter, on November 24, 1944, appellant filed, without any leave of court, and without notice to appellee, a written instrument, designated as "Plaintiff's election as to Performance" reciting the proceedings up to that time in chronological order, stating that the official duck hunting season of 1944 began on October 14, 1944 and would expire on January 1, 1945; that due to no fault of appellant it had become impossible for appellee to perform his obligation in accordance with the strict letter of the option; that by reason thereof

upon the executor, administrators and assigns of the parties.

On January 30, 1944, appellee procured a written lease

of the premises from the owner for two years from the date thereof,

for a cash rental of \$1700.00 and this lease was recorded on

January 31, 1944. The option of appellant was recorded on March

11, 1944. On May 6, 1944, appellee took title to the premises by

a warranty deed from the owner, and the deed was recorded on May

6, 1944. Other apartments were associated with both appellant and

appellee, and interested in the respective leases.

On June 9, 1944 appellant caused to be served on

appellee a written notice of his election to exercise his option,

with a demand for a lease conformable therewith, and a tender of

\$445.00 as the balance of the rent. The constable who served the

notice testified that appellee said, with profane expletives,

that he had paid several thousand dollars for the property, and

to tell Brock that if he caught him up there, he (Derry) would be

up there with a shot gun.

The complaint, filed the next day, seeks specific per-

formance of the option and such other relief as shall seem meet.

Mrs. Palmer, the former owner, was not made a party to the suit.

After an answer and reply thereto were filed the cause was returned

to the master in chancery on September 11, 1944 and hearings before

him were concluded on October 4, 1944. Thereafter, on November 24,

1944, appellant filed, without any leave of court, and without

notice to appellee, a written instrument, designated as "Plaintiff's

election as to performance" reciting the proceedings up to that

time in chronological order, stating that the official clock must

ing season of 1944 began on October 14, 1944 and would expire on

January 1, 1945; that due to no fault of appellant it had become

impossible for appellee to perform his obligation in accordance

with the strict letter of the option; that by reason thereof

appellant had the right at his election, in case the issues were found in his favor, to accept damages for non-performance or accept such part performance or slightly different performance as appellee is able to make with or without an abatement of the stipulated amount of rent or damages for deficiency of performance; and electing to accept a lease for the official duck hunting season of 1945, in lieu of the lease specified in the option, without any abatement of rent or damages for deficiency of performance, as a full, complete and satisfactory performance on behalf of appellee under the option.

The master's report, filed January 24, 1945, recommended a decree in conformity with appellant's election. Appellee's 7th exception to the report, that the master erroneously found that the deed to appellee caused a merger of the leasehold and the fee, and that appellee could not rely upon his right of possession under his lease, was overruled. All of appellee's other exceptions to the report were sustained, and the decree appealed from was entered.

The notice of appeal, filed August 7, 1945, asks a reversal and remandment, with directions to enter a decree directing appellee to perform the option as nearly as possible by executing and delivering to appellant a lease of the premises for the official duck hunting season next following the entry of such decree, which appellant agrees to accept as a substantial and satisfactory performance of the contract without any abatement of rent or damages for deficiency of performance; or, awarding appellant damages in the event of a determination that equity is now without jurisdiction to enforce such substantial performance, and for other and further relief in the premises as equity may require. The same relief is urged in appellant's statement of errors relied upon for reversal.

The evidence discloses that the land in controversy is in the vicinity of Peoria, on the Illinois River. Appellee

appellant had the right at his election, in case the issues were found in his favor, to accept damages for non-performance or accept such part performance or slightly different performance as appellee is able to make with or without an abatement of the stipulated amount of rent or damages for deficiency of performance; and electing to accept a lease for the official duck hunting season of 1945, in lieu of the lease specified in the option, without any statement of rent or damages for deficiency of performance, as a full, complete and satisfactory performance on behalf of appellee under the option.

The master's report, filed January 24, 1945, recommended a decree in conformity with appellant's election. Appellee's 7th exception to the report, that the master erroneously found that the deed to appellee caused a merger of the leasehold and the fee, and that appellee could not rely upon his right of possession under his lease, was overruled. All of appellee's other exceptions to the report were sustained, and the decree appealed from was entered.

The notice of appeal, filed August 7, 1945, asks a reversal and remandment, with directions to enter a decree directing appellee to perform the option as nearly as possible by executing and delivering to appellant a lease of the premises for the official duck hunting season next following the entry of such decree, which appellant agrees to accept as a substantial and satisfactory performance of the contract without any abatement of rent or damages for deficiency of performance; or, awarding appellant damages in the event of a determination that equity is now without jurisdiction to enforce such substantial performance, and for other and further relief in the premises as equity may require. The same relief is urged in appellant's statement of errors relied upon for reversal.

The evidence discloses that the land in controversy is in the vicinity of Peoria, on the Illinois River. Appellee

had hunted ducks along the river for 25 or 50 years. He was a game warden for 6 years, and during that time had visited practically all the hunting grounds along the river near Peoria. He testified that he had been acquainted with the land in question since 1933, but until January 1944 had not been on it since the death of Mrs. Palmer's husband. The lease to appellee contains a covenant that the lessor has the absolute right to lease the premises; that the lessee shall have the right to possession free and clear of the rights of all other persons; that the lessor is in sole possession, and that there are no outstanding leases. Appellee testified that he and his attorney who prepared the lease checked the records and found no prior lease or option. His attorney testified that Mrs. Palmer said the land had been rented for the duck season only, that she was back in possession, that she had never rented it for more than the duck season and so rented it every year. Appellee and his attorney each testified that when appellee's lease was entered into Mrs. Palmer told them there was nothing outstanding against the property. Appellee also testified that at that time he knew the land had been used for duck hunting each year for a number of years, but did not know or have any information that anybody else had any rights in the land. It also appears that Mrs. Palmer also owned the 80 acres across the road south of the land in controversy and appellee and his attorney both testified that she showed them a lease or an option for a lease on this 80 acres and told them it was the only one that had ever been outstanding.

The testimony shows that from the latter part of January or the first part of February, 1944 up to the time of the trial, appellee and his associates were in active possession of the premises, making extensive repairs and improvements, going there at least two days a week or oftener. A large part of the land is under water all the time, Nobody lives on the property, and the only fence on it is along the east side. There is a roadway along

had hunted ducks along the river for 25 or 30 years. He was a game warden for 6 years, and during that time had visited practically all the hunting grounds along the river near Peoria. He testified that he had been acquainted with the land in question since 1935, but until January 1944 had not been on it since the death of Mrs. Palmer's husband. The lease to appellee contains a covenant that the lessor has the absolute right to lease the premises; that the lessee shall have the right to possession free and clear of the rights of all other persons; that the lessor is in sole possession and that there are no outstanding leases. Appellee testified that he and his attorney who prepared the lease checked the records and found no prior lease or option. His attorney testified that Mrs. Palmer said the land had been rented for the duck season only, that she was back in possession, that she had never rented it for more than the duck season and so rented it every year. Appellee and his attorney each testified that when appellee's lease was entered into Mrs. Palmer told them there was nothing outstanding against the property. Appellee also testified that at that time he knew the land had been used for duck hunting each year for a number of years, but did not know or have any information that anybody else had any rights in the land. It also appears that Mrs. Palmer also owned the 80 acres across the road south of the land in controversy and appellee and his attorney both testified that she showed them a lease or an option for a lease on this 80 acres and told them it was the only one that had ever been outstanding. The testimony shows that from the latter part of January or the first part of February, 1944 up to the time of the trial, appellee and his associates were in active possession of the premises, making extensive repairs and improvements, going there at least two days a week or oftener. A large part of the land is under water all the time. Nobody lives on the property, and the only fence on it is along the east side. There is a roadway along

the south side, and a cabin, or club house, a short distance from the road, near the center of the south line.

It appears from the testimony of appellant that he and his associates had blasted out some ponds, and a ditch leading to a dike of a drainage district running across the northeast corner of the land, in order to get boats onto dry land, with a landing of planks and a boat rack at the dike, several hundred yards north of the southeast corner of the property. They had placed four duck blinds, made of bull grass tied or wired to uprights driven into the ground below water in a pond on the north part of the property, where they did their shooting. These had to be renewed each year. There is timber between the road on the south and the shooting pond. The land is also overgrown with brush and bullrushes, and it is impossible to see any part of the pond or the boars from the road, but to do so, one would have to walk up the dike on the east side something less than one-half mile, and then west about 100 yards to the bogt landing. There was a path along that route, leading from the cabin, with a foot bridge.

Under the terms of appellant's lease, Mrs. Palmer was to furnish three boats and not less than five dozen decoys. Appellant testified that she furnished two boats, and that another boat was furnished by him or his associates, and that they were left at the dike at the close of the hunting season about December 21, 1943; that the lessor's decoys, and the oars, push paddles, some gasoline drums and lamps, kerosene cans, two wooden lockers, cooking utensils, aprons and towels belonging to him and his associates, were stored in the club house between hunting seasons, appellant and the lessor each having a key. Appellee testified that Mrs. Palmer did not tell him that appellant had a key. After the 1942 hunting season, appellant and his associates had made some repairs to the club house, some of which were paid for by Mrs.

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Palmer. The lease provided that she should maintain it, its contents and the outbuildings in "present usable condition."

Appellee further testified that on about January 10, 1944, he took Mrs. Palmer out there with the purpose of looking at the 80 acres, and went over it; that he did not ask her, and she did not say anything about who had been hunting on the land here involved, and that she said she was going to keep it for herself, and said nothing about appellant having hunted on it, or about his having a lease for the next year; that he went back later alone and looked over the 80 acres again, as he was anticipating buying it, but made no inspection of the 160 acres, having seen it several years before and knowing what kind of land it was.

Louis Poignant, who lived about a half mile from the land and kept the boats at his place between seasons, fixed the date that appellee and Mrs. Palmer came out to the land as January 12, or 13, 1944. He testified that on that occasion he and appellee went over the 80 acres, and then came back to the cabin, Mrs. Palmer remaining in the car; and that he did not remember anything he had done in the cabin. Some discussion was had between him and Mrs. Palmer about hauling boats out to his place, and she directed him to haul a boat which appellee testified was along the roadside, and which she claimed was hers, but which afterward turned out to belong to a Mr. Droll, a watchman for one of appellant's associates.

Until January 21, 1944, the day that appellee recorded his lease, he and appellant were strangers to each other. On that day appellant came out to the premises to look for Mr. Droll's property, unlocked the cabin, went in and looked around, and then went on to the boat landing. On his return he found appellee and another gentleman coming out of the cabin, and asked appellee who he was and what he was doing in the cabin, to which appellee replied that Mrs. Palmer had given him the key and he was looking

Palmer. The lease provided that she should maintain it, its contents and the outbuildings in "present usable condition." Appellee further testified that on about January 10, 1944, he took Mrs. Palmer out there with the purpose of looking at the 80 acres, and went over it; that he did not ask her, and she did not say anything about who had been hunting on the land here involved, and that she said she was going to keep it for herself, and said nothing about appellant having hunted on it, or about his having a lease for the next year; that he went back later alone and looked over the 80 acres again, as he was anticipating buying it, but made no inspection of the 180 acres, having seen it several years before and knowing what kind of land it was.

Louis Polgnant, who lived about a half mile from the land and kept the boats at his place between seasons, fixed the date that Appellee and Mrs. Palmer came out to the land as January 10, or 12, 1944. He testified that on that occasion he and Appellee went over the 80 acres, and then came back to the cabin, Mrs. Palmer remaining in the car; and that he did not remember anything he had done in the cabin. Some discussion was had between him and Mrs. Palmer about handling boats out to his place, and she directed him to haul a boat which Appellee testified was along the roadside, and which she claimed was hers, but which afterward turned out to belong to a Mr. Droll, a watchman for one of Appellant's associates.

Until January 21, 1944, the day that Appellee recorded his lease, he and Appellant were strangers to each other. On that day Appellant came out to the premises to look for Mr. Droll's property, unlocked the cabin, went in and looked around, and then went on to the boat landing. On his return he found Appellee and another gentleman coming out of the cabin, and asked Appellee who he was and what he was doing in the cabin, to which Appellee replied that Mrs. Palmer had given him the key and he was looking

things over for her. He testified that he "was a little on guard" as he did not know appellant. That appellant told him that he had shot ducks on the property and intended to do so and that he had an option on it for the 1944 season from which appellee concluded that something was wrong, and said nothing about having a lease on the premises. He showed appellant the push paddles and appellant put them under the cabin where Mr. Droll could get them.

It is insisted by appellant that the master's findings should not be disturbed unless clearly contrary to the manifest weight of the evidence is untenable. In courts of review that doctrine is applicable to findings of fact only where the master's report is approved by the chancellor, (*Mruk v. Mruk*, 379 Ill. 394, 401), or where the court has heard the evidence. It is not applicable where the court did not hear the testimony. The findings of the master are only advisory and are open for consideration by the chancellor and by a court of review. (*Jones v. Keepke*, 387 Ill. 97, 107).

The election filed by appellant to accept a lease in lieu of the lease specified in the option without abatement of rent or damages for deficiency in performance, as a full, complete and satisfactory performance on behalf of appellee under the option, was a waiver of any claim for damages on account of non-performance and the answer to his contention that appellee's 7th exception to the master's report recognized his right to claim damages if the issues are found in his favor is, that the election was not filed by leave of court or was appellee ever apprised thereof prior to the filing of his exceptions to the master's report. Appellant took the initiative in the proceedings, and equity requires that appellee should have been informed of the filing of the election before he, appellee, could be estopped by his exceptions to claim that appellant had waived any claim for damages.

As to the question of the merger of appellee's lease by the taking of the deed, the general rule is that when the tenant's

things over for her. He testified that he "was a little on guard" as he did not know appellant. That appellant told him that he had shot ducks on the property and intended to do so and that he had an option on it for the 1944 season from which appellee concluded that something was wrong, and said nothing about having a lease on the premises. He showed appellant the lease and appellee put him under the cabin where Mr. Twill would get them. It is insisted by appellant that the master's findings

should not be disturbed unless clearly contrary to the manifest weight of the evidence is untenable. In courts of review that doctrine is applicable to findings of fact only where the master's report is approved by the chancellor, (Mark v. Mark, 373 Ill. 394, 401), or where the court has heard the evidence. It is not applicable where the court did not hear the testimony. The findings of the master are only advisory and are open for consideration by the chancellor and by a court of review. (Jones v. Keeple, 387 Ill. 27, 107).

The election filed by appellant to accept a lease in lieu of the lease specified in the option without abatement of part or damages for deficiency in performance, as a full, complete and satisfactory performance on behalf of appellee under the option, was a waiver of any claim for damages on account of non-performance and the answer to his contention that appellee's "an exception to the master's report recognized his right to claim damages if the issues are found in his favor is, that the election was not filed by leave of court or was appellee ever apprised in respect prior to the filing of his exceptions to the master's report. Appellant took the initiative in the proceedings, and equity requires that appellee should have been informed of the filing of the election before he, appellee, could be estopped by his exceptions to claim that appellant had waived any claim for damages.

As to the question of the merger of appellee's lease by the taking of the deed, the general rule is that when the tenant's

estate and the reversion come together in him, there is a merger, but there are well defined and long established exceptions to the general rule. In equity, the intention and interest of the party who unites the two estates in himself, will determine whether or not a merger takes place, and to effect a merger the right previously held and the right subsequently acquired must coalesce in the same person, without any other right intervening. (Hooper v. Goldstein, 336 Ill. 125, 132-133; Richardson v. Hookenhull, 85 Ill. 124; Huebsch v. Scheel, 81 Ill. 281; Edgerton v. Young, 43 Ill. 464; Campbell v. Carter, 14 Ill. 286; Tiffany, Landlord and Tenant, Vol. 1, pp. 68-89). Appellee did not take a deed to the premises until after appellant had informed him of the existence of his option and after the option was recorded. Manifestly, when he had both actual and constructive notice of the option and is presumed to have known the law, he would not intend and it would not be to his interest to merge his leasehold into the fee by the deed when he knew that the deed would be subject to the option, which was an intervening right. Under the exceptions to the general rule, there was no merger. Cases under the general rule, relied upon by appellant, are not in point. Appellee was entitled to rely upon his lease. The claim that what he told the constable, when served with notice of appellant's election to exercise the option that he had paid several thousand dollars for the land was a waiver of his right to rely upon the lease, and that he thereby elected to rely only upon the deed, is without merit. There is nothing in that statement to indicate that he thereby intended to waive or abandon his rights under the lease.

Upon an examination of the testimony, we are unable to say that it discloses any willful or negligent closing of appellee's eyes to facts which would have given him notice of appellant's option, or which should have put him upon further inquiry. He and his attorney searched the records, interrogated the lessor as to the

rights of anybody else in the property and were told by her that the land had been rented for the duck season only, that she was back in possession and that there was nothing outstanding against it. Her assurance went so far as to show them a lease or an option on the 80 acres, with the statement that it was the only lease or option which was ever outstanding. She had a key to the club house, and was apparently in sole possession, and appellee did not know that appellant had a key. As to the articles left in the club house, it is not shown or claimed that there was any general custom of sportsmen in that respect, and the fact that appellant did so does not establish such a custom as would be notice to appellee of his rights thereunder, if any. (*Bissell v. Ryan*, 23 Ill. 566; *Kelly v. Carroll*, 223 Ill. App. 314). Appellant recognized Mrs. Palmer's right to have a key, and she was as much in possession as he. Where the record owner of property is in possession of property, and a second party is likewise in possession, the possession of the latter is not notice to purchasers or judgment creditors of rights which such person may claim in the premises by his possession, but his possession, in order to be such notice, must be exclusive and unequivocal. (*Union Bank of Chicago v. Gallup*, 317 Ill. 184, 189; *Gray v. Lamb*, 207 Ill. 258). Furthermore, the character of the articles left in the club house was such that appellee might well assume that those of any consequence belonged to the premises, and that the others had been abandoned by the former lessee.

While appellant and his associates had blasted out a pond and ditch and installed a wooden boat landing and boat rack, there is no showing or claim that they were installed except for use in the seasons when they were actually used, and no claim is made that they did not belong to the lessor. After the expiration of the hunting season their mere presence would not indicate to

rights of anybody else in the property and were told by her that the land had been rented for the duck season only, that she was back in possession and that there was nothing outstanding against it. Her assurance went so far as to show that a lease or an option on the 30 acres, with the statement that it was the only lease or option which was even outstanding. She had a key to the club house, and was apparently in sole possession, and appellee did not know that appellant had a key. As to the articles left in the club house, it is not shown or claimed that there was any general custom of sportsmen in that respect, and the fact that appellant did so does not establish such a custom as would be notice to appellee of his rights thereunder, if any. (Bissell v. Ryan, 23 Ill. 586; Kelly v. Carroll, 23 Ill. App. 314). Appellant recognized Mrs. Palmer's right to have a key, and she was as such in possession as he. Where the record owner of property is in possession of property, and a second party acquires in possession the possession of the latter is not notice to purchasers or judgment creditors of rights which such person may claim in the premises by his possession, but his possession, in order to be such notice, must be exclusive and unequivocal. (Union Bank of Chicago v. Gellup, 317 Ill. 184, 188; Gray v. Lamb, 307 Ill. 550). Furthermore, the character of the articles left in the club house was such that appellee might well assume that those of any consequence belonged to the premises, and that the others had been abandoned by the former lessee.

While appellant and his associates had blasted out a pond and ditch and installed a wooden boat landing and boat rack, there is no showing or claim that they were installed except for use in the seasons when they were actually used, and no claim is made that they did not belong to the lessor. After the expiration of the hunting season their mere presence would not indicate to

appellee anything more than that sort of a situation and the grass on the duck blinds, which had to be renewed each hunting season, had served its purpose for the 1943 season.

Appellant cites and relies upon the case of *Gustin v. Barnye*, 250 Ill. App. 209. In that case it appeared that while an unrecorded lease was in force, the lessor conveyed the premises by deed during the hunting season of 1925. The evidence disclosed that there were on the premises three blinds of cut willows, three circular feeding pens, inclosed by 150 feet of chicken wire 5 feet high, attached to poles stuck in the ground, each containing a raft or float upon which was a box of feed for live call ducks, with approximately 25 live call ducks in each pen, and there were "no Trespassing" signs with the lessee's name thereon posted on trees and stumps, clearly showing the lessee's possession and the court held that these were sufficient notice of his rights. That case is not applicable here, where it appears that the lease to appellee was made after the close of the hunting season, and the physical conditions did not indicate that anybody else was in possession or had an option for another lease. We are unable to say that there was anything apparent to appellee, or that he could have been charged with seeing by further examination of the premises, that would have discredited Mrs. Palmer's assurances to him and his attorney, or that would have prompted or necessitated further inquiry.

When appellee was accosted by appellant at the premises on January 21, 1944, they were strangers to each other, and the fact that appellee did not disclose his lease at that time to appellant, who asserted he had an option for the next hunting season, does not in the light of appellee's testimony that he knew something was wrong and was on his guard, militate against his good faith in having procured the lease. If he had had any knowledge of appellant's rights and had sought to supplant him, it is reasonable to think that he would have procured his lease immediately after his trip out there about January 10th, but he did not do so until

appellee anything more than that sort of a situation and the
grass on the duck blinds, which had to be renewed each hunting
season, had served its purpose for the 1943 season.

Appellant often and relies upon the case of *Quartin v. Barthele*,
300 Ill. App. 308. In that case it appeared that while an un-
recorded lease was in force, the lessor conveyed the premises by
deed during the hunting season of 1935. The evidence disclosed
that there were on the premises three blinds of cut willows, three
circular feeding pens, inclosed by 150 feet of chicken wire 5 feet
high, attached to poles stuck in the ground, each containing a
raft or float upon which was a box of feed for live call ducks, with
approximately 25 live call ducks in each pen, and there were "no
trespassing" signs with the lessee's name thereon posted on trees
and stumps, clearly showing the lessee's possession and the court
held that there were sufficient notice of his rights. That case
is not applicable here, where it appears that the lease to appellee
was made after the close of the hunting season, and the physical con-
ditions did not indicate that anybody else was in possession or had
an option for another lease. We are unable to say that there was
anything apparent to appellee, or that he could have been charged
with seeing by further examination of the premises, that would have
disclosed Mrs. Palmer's agreement to him and his attorney, or
that would have prompted or necessitated further inquiry.

When appellee was associated by appellant at the premises
on January 21, 1944, they were strangers to each other, and the
fact that appellee did not disclose his lease at that time to
appellant, who asserted he had an option for the next hunting
season, does not in the light of appellee's testimony that he knew
nothing was wrong and was on his guard, militate against his good
faith in having procured the lease. If he had had any knowledge of
appellant's rights and had sought to ascertain them, it is reasonable
to think that he would have procured the lease immediately after
his trip out there about January 10th, but he did not do so until

the 20th of that month. Our conclusion is that both parties acted in good faith in their dealings with Mrs. Palmer, and the circumstances were not such as would put appellee upon notice of appellant's rights before he procured his lease. So far as the record shows, Mrs. Palmer was an available witness for either party. Neither of the parties called her to testify. No legal effect, however, can be deduced from this fact helpful to one or disparaging of the other simply because he did not produce her as a witness.

Appellee recorded his lease on January 21, 1944, the day after it was obtained and he went into actual possession almost immediately thereafter. Although appellant obtained his option on October 6, 1943, he did not record it until March 11, 1944, more than a month after appellee was in actual and notorious possession of the leased premises. It is a maxim that equity aids the vigilant, not those who slumber on their rights. Another familiar maxim is that where the equities are equal, the law will prevail, and the long established rule of law is that where there are two innocent parties, and one of them makes possible or puts into the hands of a third party the power to commit a fraud, or an act which occasions a loss, he must stand the loss.

The chancellor was correct in dismissing the complaint for want of equity and the decree appealed from will be affirmed. This conclusion dispenses with the necessity of considering other matters urged on this appeal.

Decree affirmed.

the 30th of that month. Our conclusion is that both parties acted in good faith in their dealings with Mrs. Palmer, and the circumstances were not such as would put appellee upon notice of appellant's rights before he procured his lease. As far as the record shows, Mrs. Palmer was an available witness for either party. Neither of the parties called her to testify. The legal effect, however, can be deduced from this fact which is one or disparaging of the other party because he did not produce her as a witness.

Appellee recorded his lease on January 11, 1944, the day after it was obtained and he said into court a position almost immediately thereafter. Although appellant obtained his title on October 6, 1943, he did not record it until March 11, 1944, more than a month after appellee was in actual and notorious possession of the leased premises. It is a maxim that equity aids the vigilant, not those who slumber on their rights. Appellant familiar with the law is that where the equities are equal, the law will prevail, and the long established rule of law is that where there are two innocent parties, and one of them takes property or puts into the hands of a third party the power to commit a fraud, or an act which occasions a loss, he must stand the loss. The chancellor was correct in dismissing the complaint for want of equity and the decree appealed from will be affirmed. This conclusion agrees with the necessity of considering other matters urged on this appeal.

Decree affirmed.

Abstract

GEN. NO. 10067

AGENDA NO. 8.

IN THE APPELLATE COURT OF THE

STATE OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1946

IN THE MATTER OF THE ESTATE
OF MARY PETERS, DECEASED,
WARD THOMPSON AND LAURA
THOMPSON,
Plaintiffs-Petitioners-Appellees,

v.

ESTHER A. PETERS, EXECUTOR OF THE
LAST WILL AND TESTAMENT OF MARY
PETERS, DECEASED,
Respondent-Defendant,
JAMES H. PETERS,
Defendant-Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
WHITESIDE COUNTY

323 I.A. 400²

Dove, J.

This cause is here by an appeal from an order of the circuit court of Whiteside County, ordering the executor of the estate of Mary Peters, deceased, to pay appellees the share of her son, James H. Peters, in the estate, under a written assignment of his prospective interest therein made during the decedent's lifetime, to Steve White, now deceased, whose executor in turn assigned the assignment to appellees. Appellant claims that the assignment, absolute on its face, was collateral for the payment of a promissory note to White.

On October 16, 1916, James H. Peters borrowed \$800 from Steve White, evidenced by a promissory note of that date, bearing interest at 7% due one year after its date, signed by appellant James H. Peters, using the name of J. N. Peters, and bearing the purported signatures of Mary Peters and Ethel Peters. On August 14,

APPELLATE

APPELLATE NO. 8

GEN. NO. 10087

IN THE APPELLATE COURT OF THE

STATE OF ILLINOIS

SECOND DISTRICT

TERMINAL TERM, A. D. 1946

IN THE MATTER OF THE ESTATE
OF MARY PETERS, DECEASED,
WARD THOMPSON AND LAURA
THOMPSON,
Plaintiffs-Petitioners-Appellees,

v.

ROBERT A. PETERS, EXECUTOR OF THE
LAST WILL AND TESTAMENT OF MARY
PETERS, DECEASED,
Respondent-Defendant,
JAMES H. PETERS,
Defendant-Appellant.

APPELLATE COURT OF
THE STATE OF ILLINOIS
SECOND DISTRICT

3801 A. 400

Dove, J.

This cause is here by an appeal from an order of the circuit court of Whiteside County, ordering the executor of the estate of Mary Peters, deceased, to pay appellees the share of her son, James H. Peters, in the estate, under a written assignment of his prospective interest therein made during the decedent's lifetime, to Steve White, now deceased, whose executor in turn assigned the assignment to appellees. Appellant claims that the assignment, absolute on its face, was collateral to the payment of a promissory note to White.

On October 16, 1916, James H. Peters borrowed \$300 from Steve White, evidenced by a promissory note of that date, bearing interest at 7% due one year after its date, signed by appellant James H. Peters, using the name of J. H. Peters, and bearing the purported signatures of Mary Peters and Ethel Peters. On August 14,

1922, James H. Peters assigned his prospective interest in his mother's estate to White, the consideration being expressed therein as \$1.00 and other good and valuable considerations, the assignment being absolute in its terms. White retained the note in his possession and Peters made payments thereon aggregating \$370.00 the last of which was on January 27, 1928. On January 4, 1938, White started suit on the note in the circuit court of Whiteside County, and the cause was still pending when Mary Peters died on September 6, 1938 and at the time White died on July 23, 1940. The note was inventoried in White's estate, reciting \$1754.00 as the unpaid balance, with a statement of the pending suit, the pleading of Mary Peters that her name on the note was not her signature, her subsequent death, and that the "assignment aforesaid was made by said J. N. Peters to the said Steve White upon the consideration evidenced by said note."

On April 22, 1941, the executor of White's estate assigned to appellees the note and also assigned to them the said assignment of James H. Peters to White. On April 10, 1943 appellees appeared in the suit on the note and on their motion the suit was dismissed on May 3, 1943. On June 2, 1944, appellees filed their petition in the county court against the executor alone asking payment to them of the share of James H. Peters in the Mary Peters estate, as assignees thereof, and an order granting the petition was ^{entered} ~~made~~ from which the executor appealed to the circuit court. By leave of ^{the} court, appellant, James H. Peters, filed an intervening petition in the cause and an answer and counter-claim. In these he alleged the execution of the note, the payment thereon, and claiming that the assignment was made to secure its payment as collateral only and seeking to limit the recovery of appellees to the amount due on the note,

1922. James H. Peters assigned his prospective interest in his mother's estate to White, the consideration being expressed therein as \$1.00 and other good and valuable considerations, the assignment being absolute in its terms. White retained the note in his possession and Peters made payments thereon aggregating \$375.00 the last of which was on January 27, 1923. On January 4, 1923, White started suit on the note in the circuit court of Adams County, and the cause was still pending when Harry Peters died on September 4, 1923 and at the time White died on July 23, 1924. The note was inventoried in White's estate, reciting \$175.00 as the unpaid balance, with a statement of the pending suit, the pleading of Harry Peters that her name on the note was not her signature, her subsequent death, and that the "assignment" referred to was made by said J. H. Peters to his said wife White upon the death of said J. H. Peters by said note.

On April 23, 1924, the executor of White's estate assigned to appellees the note and also assigned to them the said assignment of James H. Peters to White. On April 10, 1924 appellees appeared in the suit on the note and on their motion the suit was dismissed on May 3, 1924. On June 2, 1924, appellees filed their petition in the county court against the executor alone asking payment to them of the moneys of James H. Peters in the Harry Peters estate, as assigned thereto, and an order granting the petition was ^{entered} from which the executor appealed to the circuit court. By leave of court, appellees, James H. Peters, filed an intervening petition in the cause and an answer and counter-claim. In these he alleged the execution of the note, the payment thereon, and claiming that the assignment was made to secure the payment of said note only and asking to limit the recovery of appellees to the amount due on the note.

The answer of the executor was to the same effect. Upon the hearing it was stipulated that appellees are the owners of the note and the assignment, and that \$1248.53 had been paid by the executor to the appellees, representing moneys in the Mary Peters estate belonging to James H. Peters.

Appellant's claim that the order of the county court was a nullity because he was not made a party to appellee's petition in the proceeding in that court is of no consequence, inasmuch as he filed an intervening petition, an answer and a counterclaim in the circuit court on the appeal, thereby submitting his person to its jurisdiction and the cause was tried de novo. ~~and~~ His other suggestions on jurisdictional questions are answered adversely to his contention in Pocahontas Mining Co. v. Industrial Commission, 301 Ill. 462, 476; Randolph V. ^{County} Halls, 18 Ill. 29; Allen v. Belcher, 3 Gilm. 594 and Herb V. Pitcairn, 392 Ill. 138 is analagous.

When appellant's deposition was offered in evidence, it was objected to on the ground that all the testimony in it was incompetent, irrelevant and immaterial, and was an attempt to change a written instrument by oral testimony. The latter ground is urged by appellees in this court. Whether the court admitted the deposition in evidence does not appear from the record. The deposition is to the effect that appellant talked with White in 1922 about the note and that security therefor was discussed; that White said he was in no particular hurry for the money if appellant could give him some other security, and it was agreed that appellant would make the assignment, which he did; that he received no money when the assignment was made, and that the note except the payments which had been made thereon, was still unpaid.

Even if it be conceded that appellant's testimony as to the collateral character of the assignment was incompetent on the ground urged by appellees, there is other abundant

The answer of the executor was to the same effect. In the hearing it was stipulated that appellees are the owners of the note and the assignment, and that 1922, 23 and 24 were paid by the executor to the appellees, representing money in the Mary Peters estate belonging to James H. Peters.

Appellant's claim that the order of the county

court was a nullity because he was not made a party to appellee's petition in the proceeding in that court is of no consequence,

inasmuch as he filed an answering petition, and as he was a

counterclaim in the circuit court on the record, to deny validity of his person to the jurisdiction and the cause was tried de novo.

The other objections on jurisdictional grounds are

answered adversely to the contention in *Donahoe v. Smith Co.*

v. Industrial Corporation, 301 Ill. 462, 476; *Knobloch v. Illinois*,

12 Ill. 29; *Allen v. Belcher*, 2 Ill. 594 and *Warp v. Pilsbry*,

397 Ill. 136 is analogous.

When appellant's deposition was offered in evidence,

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was incompetent, irrelevant and immaterial, and was an attempt

to change a written instrument by oral testimony. The latter

ground is urged by appellees in this court. Whether the court

admitted the deposition in evidence does not appear from the record.

The deposition is to the effect that appellant talked with W. J.

in 1922 about the note and that security thereon was discussed;

that W. J. said he was in no particular hurry for the money if

appellant could give him some other security, and it was agreed

that appellant would make the assignment, which he did; that he

received no money when the assignment was made, and that the note

except the payments which had been made thereon, was still unpaid.

Even if it be conceded that appellant's testimony as

to the collateral character of the assignment was incompetent

on the ground urged by appellees, there is other abundant

competent testimony in the record that it was only intended to be used as collateral security for the payment of appellant's note. White retained the note in his possession and appellant thereafter made a payment or payments thereon as late as January 27, 1928 about five and one-half (5½) years after the assignment was made, which refutes appellees' suggestion that appellant could probably have obtained the note at any time by asking for it. Within the limitation period of ten years, White started suit on the note, evidencing his intention to keep it alive, and this suit was still pending on May 3, 1943. During this time and on April 22, 1941, appellees acquired not only the assignment to White, but also the note, and, by the stipulation, they still own it. The note was inventoried in White's estate as an asset thereof, with a statement indicating that the assignment by appellant was collateral for its payment. These circumstances clearly and sufficiently show that the assignment was intended by appellant and by White as collateral, and was treated as such by both of them and by White's executor. Appellees, as purchasers of the note and the assignment, are ^{not only} chargeable with notice of the payments made on the note after the assignment, ^{but with} ~~also~~ with what the records disclose as to White's suit on the note, and the statement in the inventory in his estate, indicating the collateral character of the assignment. It is not claimed that appellant received any money or anything else of value from White at the time the assignment was made, or that the consideration for the assignment was other than the unpaid portion of the debt due on the note.

Appellant's testimony that he did not know of the payment by the executor to appellees of \$1247.58 (stipulated as being \$1248.53 was competent. His counterclaim alleges that he had never been made a party to any of the proceedings relating to the distribution of any moneys due him as an heir at law or under the will of his mother, and this allegation and his testimony on the subject is not contradicted by any evidence in the record. His

competent testimony in the record that it was only intended to be used as collateral security for the payment of appellant's note. White retained the note in his possession and appellant thereafter made a payment on payments thereon as late as January 25, 1908 about five and one-half (5½) years after the assignment was made, which further corroborates suggestion that appellant could probably have obtained the note at any time by asking for it. Within the limitation period of ten years, White started suit on the note, obtaining his location to keep it alive, and this suit was still pending on May 2, 1912. During this time and on April 22, 1911, appellee acquired not only the assignment to White, but also the note, and by the assignment they still own it. The note was inventoried in White's estate as an asset thereof, with a statement indicating that the assignment by appellant was collateral for the payment. These circumstances clearly and conclusively show that the assignment was intended by appellant and by White as collateral, and was treated as such by both of them and by White's executor. Appellee, as purchaser of the note and the assignment, took it with notice of the payments made on the note after the assignment, and the assignment records disclose as to White's suit on the note, and the assignment in the inventory in his estate, indicating the collateral character of the assignment. It is not claimed that appellee received any money or anything else of value from White at the time the assignment was made, or that the consideration for the assignment was other than the unpaid portion of the debt due on the note. Appellant's testimony that he did not know of the payment by the executor as appellee of \$257.50 (estimated as being \$250.00 was constant. His counterclaim alleges that he had never been made a party to any of the proceedings relating to the distribution of any moneys due him as an heir at law or under the will of his mother, and this allegation and his testimony on the subject is not contradicted by any evidence in the record. His

mother's estate is still in process of administration, and it cannot be said from any facts in evidence that he has been guilty of laches in claiming his rights under the assignment.

Appellees, charged with notice of the collateral character of the assignment, did not dismiss the suit on the note against appellant until they had owned both the note and the assignment approximately two years. By so doing they treated the note all that time as a subsisting enforceable obligation. Their claim that the note is now outlawed and of no value is untenable. That part of appellant's deposition that he left Illinois in 1930 and has been outside of the state since that time, was competent and his absence tolled the Statute. (Ill. Rev. St. 1945, chap. 83 Par. 19). The note ~~therefore~~ is an existing enforceable obligation and is so recognized by appellant and also by appellees.

It is a familiar rule that where a deed is made by a mortgagor to a mortgagee, and the mortgage debt is not satisfied, but is kept alive, the transaction is a mortgage. (Ennor v. Thompson, 46 Ill. 214, 223; Totten v. Totten, 294 ⁺Ill. 70, 79.)

The right to redeem from a pledge of personal property should not, in any event, be denied by the courts on the ground that it has been lost by laches or has been waived or abandoned by the pledgor, so long as that right is recognized by the pledgee and the pledgor. (Daly v. Spiller, 222 Ill. 421, 425). While the instant transaction was not strictly a pledge under the meaning of that term, inasmuch as it lacked manual delivery of the subject matter, the principle involved is the same, especially so in an equitable proceeding, which characterizes this proceeding. (Thornton v. Louch, 297 Ill. 204, 211-212; Hudson v. Hudson, 222 Ill. 527, 530; Dyblie v. Dyblie, 389 Ill. 328, 329.)

The order of the circuit court is reversed, and the cause is remanded to that court with directions to proceed in accordance with the views herein expressed.

Reversed and remanded.

to be used in the future in connection with the investigation of the case.

At the time of the investigation, the following information was obtained:

character of the statement; the fact claimed the suit on the note against appellant until they had owned back the note and the assignment approximately two years. By so doing they threatened the note all that time as a continuing obligation against them. They claim that the note is now outlawed and is no longer enforceable. That part of appellant's deposition which he felt intimate in 1930 was his own advice on the note which was then times, was concerned and his answer called for a note. (Ex. 10). The note was issued in an original \$100.00 and is a negotiable instrument and is a negotiable instrument and is a negotiable instrument.

It is a further rule that where a deed is made by a corporation to a corporation, and the corporation is not a trustee, the transaction is a mortgage. (100 v. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910,

should not, in any event, be held by the court in this case that it was not lost by failure to have been insured or accompanied by the shipper, so long as that right is recognized by the shipper and the shipper. (Daily v. Miller, 222 Ill. App. 2d, 1974).

Instant citation was not strictly a case where the meaning of that term, inasmuch as it looked merely delivery to the subject matter, the principle involved is the same, especially so in an equitable proceeding, which the procedure was appropriate.

(Daily v. Miller, 222 Ill. App. 2d, 1974; Daily v. Miller, 222 Ill. App. 2d, 1974; Daily v. Miller, 222 Ill. App. 2d, 1974).

is intended to that court will direct me to report in accordance with the views therein expressed.

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1946

PEOPLE OF THE CITY OF
OTTAWA, ILLINOIS,
PETITIONERS-APPELLANTS

v.

CITY OF OTTAWA, ILLINOIS,
A MUNICIPAL CORPORATION,
DEFENDANT-APPELLEE

328 I.A. 401

IN THE MATTER OF PETITION, OBJECTIONS
THERETO AND ANSWER THERETO CONCERNING:
"AN ORDINANCE PROVIDING FOR THE IN-
STALLATION OF PARKING METERS AND
ESTABLISHING REGULATIONS FOR THEIR
USE AND OPERATION," PASSED BY THE CITY
COUNCIL OF THE CITY OF OTTAWA,
ILLINOIS, APRIL 2, 1945, AND APPROVED
BY THE MAYOR OF SAID CITY OF OTTAWA,
ILLINOIS, APRIL 3, 1945, AND PUBLISHED
APRIL 11, 1945.

APPEAL FROM THE
COUNTY COURT OF
LA SALLE COUNTY

Dove, J.

This cause is here by an appeal from a decree of the county court of LaSalle County, sustaining objections to a petition signed by certain electors of the City of Ottawa, directed to the city clerk, demanding that an ordinance for the installation of parking meters and establishing regulations for their use and operation, passed April 2, 1945, duly approved by the mayor and published, be suspended and reconsidered by the city council, in accordance with section 19-69, and all sections pertinent thereto, of the Cities and Villages Act. (Ill. Rev. Stat. 1945, chap. 24, par. 19-69, et seq.).

Section 19-69 provides for the filing with the city clerk, within 30 days after the final passage of an ordinance such as the one in controversy, of a petition protesting against the passage of

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the ordinance, signed by electors of the municipality equal in number to at least 10% of the votes cast for mayor at the last preceding general quadrennial municipal election, the suspension of the ordinance upon the filing of such a petition, the reconsideration thereof by the council, and if not repealed, for submitting the same to a vote of the electors as provided in subsection (b) of section 19-56. It further provides that the signature, verification, authentication, inspection, certification, submission, and the manner of testing the sufficiency of such a petition shall be the same as that provided for petitioners under sections 19-58 to 19-60 inclusive, except that the petition shall be filed with the municipal clerk in all cases.

Section 19-56, (concerning removal of an incumbent of an elective office, provides in subdivision (b): "The petition shall be substantially in the following form:" The form consists of a heading addressed to the municipal clerk, reciting: "We, the undersigned electors of the city (or village) of _____, ***** do hereby demand an election of a successor to (name of person) for the following reasons:" (reasons to be stated). with space for signatures under the headings: "Name, House Number (if any), Street, Date of Signing." This is followed/form of affidavit to be executed, verifying the signatures "on this sheet" with specified details. Subdivision (c) of that section provides:

"The petition shall consist of sheets having the form specified in subdivision (b) of this section, except the affidavit, printed or written at the top thereof and shall be signed by electors in their own handwriting. Opposite his signature, each petitioner shall write the street and number of his residence (if there are such) and the date on which he signs the sheet. No signature shall be valid unless the requirements in this subdivision are complied with and unless the date of signing is less than four months preceding the date of filing the petition."

It is then provided that at the bottom of each sheet shall be added the affidavit in the form prescribed in subdivision (b) which shall be signed and sworn to by a resident of the municipality; that the petition, so verified, or a duly certified copy, shall be prima

facile evidence that the signatures, statement of residence, and dates upon the petition are genuine and true, ask that the persons signing the petition are electors qualified to vote for a successor of such incumbent, and, in municipalities in which electors are required to be registered, that they were duly registered voters at the time they signed the petition. A provision follows that the sheets shall be fastened together at the upper edges in one document and filed as a whole.

Section 19-59 provides: "All objections to such a petition shall be filed with the clerk with whom the petition is filed, within five days after the petition is filed. If objections are so filed against the petition, then immediately after the expiration of that five day period the specified clerk shall file the petition, together with all objections thereto, with the clerk of the county or circuit court of the county in which the municipality is situated."

"Jurisdiction is vested in the county court ***** to determine without a jury the sufficiency of the petition."

"The clerk of the court, with whom the petition and objections thereto are filed, immediately after they are filed with him, shall present them to the judge thereof. The judge (1) shall note thereon the day presented, and (2) shall also note thereon the day when he will hear them, which day shall be not less than five nor more than ten days after the day of presentation, and (3) shall order five days' notice thereof to be given by publication in some daily secular newspaper published in the municipality, or, if there is none," for alternative notice by posting.

The petition in this case, signed with the names of 712 persons, bears file marks showing filing with the city clerk on May 2, 1945, and with the clerk of the county court on May 7, 1945. Objections thereto were filed with the latter on May 7, 1945. The objections do not bear any file mark of the city clerk. Endorsed on the objections, but not on the petition, are the notations prescribed by the statute, signed by the judge, who also entered an order on May 7, 1945, conformable to the notations. Appellants' motion, under a limited appearance, to dismiss the objections on the ground that the court had no jurisdiction of the subject matter or the persons, was denied, as was their demand for a bill of particulars, and they filed an answer to the objections. The cause was heard on the petition, the objections, and the answer, and the court entered the decree appealed from, finding that it had jurisdiction of the subject matter and the parties, and that the petition does not comply with the statute, and is insufficient under the law to warrant the

calling of an election or repealing the ordinance by the city.))

Appellants' motion to dismiss the objections, on the ground that the court had no jurisdiction of the subject matter or of the persons, assigns as reasons therefor that (a) the objections were not filed with the city clerk as provided by the statutes: (b) that the record shows that the petition and the objections were filed with the clerk of the county court immediately before, instead of immediately "after" the expiration of the statutory five day period: (c) that the statute requires the judge to note the day of presentation and the day set for the hearing, on both the petition and the objections, and that no such notation appears on the petition; and (d) that under the statute the notice of hearing should have been published on five successive days, but was published only once. It is urged that the court erred in denying the motion to dismiss the objections on these same grounds. Appellants also claim that the court erred in denying the demand for a bill of particulars, and in entering the decree sustaining the objections to the petition.

Jurisdiction of the subject matter does not mean simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which that particular case belongs. (Pocahontas Mining Co. v. Industrial Commission, 301 Ill. 462, 474.) Appellants confuse jurisdiction of the subject matter with jurisdiction in the particular case. Jurisdiction of the subject matter is expressly vested in the county court by the statute. Substantial defects in the petition or in the objections, or in complying with the statute, might be cause for the dismissal of either of them, respectively, but such defects do not affect jurisdiction of the subject matter. Furthermore, if the Court did not have jurisdiction of the subject matter, the obvious duty of the court would be to dismiss the entire proceeding, not merely the objections, however, fatally deficient they might be. It is equally

manifest that if the notice of publication was insufficient, or if the petition and the objections were prematurely filed, those grounds would also go to the proceeding itself, and not merely to the objections. So, too, the claim that the judge's notations were not endorsed on the petition, would not affect the sufficiency of the objections.

As to the alleged ground that the objections were not filed with the city clerk as provided by statute, the record shows that they were filed with the clerk of the county court. The statute requires the city clerk to so file them. Obviously he could not do so unless they were previously filed with him. The statute does not require him to place any file mark thereon. No rule is better settled than that there is a presumption that public officers do their duty and that their proceedings are regular. (*People ex rel. Davlin v. Auditor of Public Accounts*, 2 Scam. 567, 570; *Wiantic Bank v. Dennis*, 37 Ill. 381, 386; *People v. Cincinnati, Lafayette and Chicago Railway Co.*, 256 Ill. 280, 282-283; *People v. New York Central Railroad Lines*, 381 Ill. 490, 497). The presumption therefore is, in the absence of a showing to the contrary, of which there is none, that the objections were filed with the city clerk and that he filed them with the clerk of the county court, and that the proceedings were regular. The trial court correctly denied the motion to dismiss the objections on the grounds urged by appellants.

Why appellants should urge, as they still do, that the court was without jurisdiction because the judge did not endorse his notations on the petition, or that the publication notice was insufficient, or that the petition and the objections were prematurely filed, is not apparent. If those grounds were tenable, their petition and their alleged cause of action with it, would be out of court. But we do not think that any of such grounds renders the proceeding or the objections vulnerable to a jurisdictional attack, or that any of them is of such ~~mx~~ merit as to constitute a ground for striking the objections.

All of the contentions of appellants as to the alleged insufficiency of the notice by publication are answered adversely in Central Illinois Public Service Co. v. City of Taylorville, 307 Ill. 311 and Crocher v. Abel, 346 Ill. 269. Cases cited by appellants under a statutory requirement for notice by six days' publication, (not six days' notice by publication) are clearly distinguishable. As to the alleged premature filing of the petition and the objections, the statute clearly means to impose the duty of promptness upon the city clerk, and not to penalize anybody by his extra diligence. There is no merit in the claim that the judge failed to endorse his notations on the petition. In any event it would not affect the objections.

An inspection of the original petition, inserted in the record by order of the trial court, discloses that more than 400 of the signers did not write the date on which they signed, but such dates are in the handwriting of some other person or persons; that two of the signers gave their residence as "Dayton, Illinois"; that eight more gave their residence as "R. F. D."; that 146 signers used ditto marks for their residence or date of signing; that 27 signers did not state any street address; that in 4 cases the maker of the affidavit at the foot of the sheet certified to his own signature thereinabove; that no date appears after the names of 5 signers; that one purported signature reads: "Mr. and Mrs. Albert Fitzgerral"; and that all of the sheets attached to the petition, bearing signatures, have no heading, as required by subdivisions (b) and (c) of section 19-58 above mentioned.

These omissions, irregularities and discrepancies among others not necessary to be mentioned, were embraced in the objections. While some of the objections referred to "several" signers, and some of the objections to "some" persons, and appellants claim that the court could not determine therefrom the number of signatures objected to, the discrepancies are such as appear on the face of the petition itself, without the necessity of any extrinsic proof, and

which the court could determine by a mere inspection of the petition. The claim of indefiniteness is without merit.

The answer admits the allegations of the objections as to "several" and "some" signers, the allegations of non-residence as to certain and "several" others; the ditto marks; that several dates are in the handwriting of one person; that several signers stated no street address; that others are without any date; that the persons circulating some of the sheets certified to their own signatures; and the allegation as to the signature of the Fitzgeralds. The answer alleges that 5720 votes were cast for mayor at the last preceding specified election. This would require 572 legal signatures to the petition. Under the mandatory terms of the statute, the irregularities, omissions or discrepancies are such that the petition was clearly insufficient. The decree of the county court is therefore affirmed.

Decree Affirmed.

which has been well illustrated by a new illustration of the fall-

[illegible]

James P. O'Neil, Editor

43183

RUSSELL FIREBAUGH, Trustee,
Plaintiff,

v.

ARTHUR F. JOHNSON et al.,
Defendants.

UNION TRUST BANK,
Petitioner Appellant,

v.

WILLIAM S. NEWBURGER,
Respondent Appellee.

208 A
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

328 I.A. 529

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is an appeal, on leave granted, from an order discharging a rule to show cause in a civil contempt proceeding. The appeal is prosecuted by Union Trust Bank which sought in the Superior court to have the respondent, William S. Newburger, master in chancery, show cause why he should not pay the pro rata amount alleged to be due petitioner on certain nondeposited bonds in a foreclosure suit.

It is first urged by respondent that the appeal should be dismissed because, as his counsel contend, "The great weight of authority is that such an order refusing to punish for civil contempt is not appealable." They cite no Illinois decisions, but rely on cases in other states, in most of which criminal contempts were involved. Notwithstanding their assertion that "the precise question seems never to have been passed upon by the courts of review in this State," we find in petitioner's brief several Illinois cases decided adversely to respondent's contention. A similar situation was presented in the recent case of People v. Lew, 380 Ill. 531, where a Special Commissioner failed to make distribution of funds arising from the sale of property under foreclosure, and the court held that appeal is the proper method of review of an order of release.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY

328 I.A. 329

43183
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v.

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Defendants.

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recent case of People v. Lewis, 360 Ill. 521, where a Special
Commissioner failed to make distribution of funds arising from
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appeal is the proper method of review of an order of release.

In Hawley Products Co. v. May, 314 Ill. App. 537, it was held that an order discharging the rule to show cause was appealable, and after discussing several earlier Illinois decisions the court stated: "Nothing said in any of those cases lends any support to the claim of appellees that it is only the imposition of an imprisonment or the assessment of a fine, and not the finding of guilty or not guilty, that gives the right of review. The motion to dismiss the appeal is denied." In People v. Diedrich, 141 Ill. 665, the court held that when the proceeding is to secure and enforce a civil remedy it is for the benefit of the party complaining. "It is, to all intents and purposes, between the party insisting upon obedience to the injunction and the one charged with its violation. *** The right to appeal is in either party, as in other cases in chancery." In Lamb v. Cramer, 285 U. S. 217, it was urged by petitioner that the proceeding was criminal in its nature, to punish for criminal contempt, and that therefore the order dismissing the petition was not appealable. The petition in that case charged the contumacious acts of Lamb in diverting the property which was the subject matter of the principal suit, and the prayer of the petition, which the court characterized as "determinative of the nature of the proceeding," was to secure restoration of the diverted property in order to carry out the decree in the principal suit. The court cited Lamb to show cause why he should not be punished for contempt and why he should not be adjudged to hold the property subject to the jurisdiction of the court, and in determining whether the order of discharge was appealable, the court said: "To the extent that this purpose might be effected by process against Lamb for contempt, the proceeding was remedial, to aid in giving to the plaintiffs the property which, as against the defendants in the principal suit, they were entitled to receive. It is the

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purpose of the punishment, rather than the character of the act punished, which determines whether the proceeding is for civil or criminal contempt. *** Even though the particular acts of the petitioner may take the characteristics of both a civil and a criminal contempt, and so may not be classified as exclusively one or the other, *** still, under the allegations and prayer of the petition, it would have been competent for the District Court to punish the contempt by its coercive order until Lamb made restitution of the property or to impose a fine, payable to the receiver, compensating for its taking. A proceeding to secure such relief is civil in its nature." (Italics ours.) From the foregoing decisions it appears to be the clearly established rule that petitions of this nature whose purpose is to secure restoration or enforcement of property rights, are held to be civil contempt proceedings, from which either party may appeal, and inasmuch as respondent concedes that the case at bar involves civil contempt, an appeal is the proper method of review of the order of discharge. Therefore the motion to dismiss the appeal is denied.

Upon consideration of the appeal on its merits, it appears from the pleadings and evidence that in July, 1929 Mrs. Hedwich Gertze purchased from one Hardt, a dealer in securities, bonds numbered 109 and 110, and paid him the par value thereof, \$500.00 for each of said bonds or a total of \$1000.00. These bonds were part of an issue of 280 bonds in the aggregate principal sum of \$98,500.00, evidencing an indebtedness on improved property described as Faylor Apartments in Chicago, secured by a trust deed under which Russell Firebaugh was designated as trustee. The property was subsequently foreclosed, and a decree of foreclosure and sale was entered December 23, 1930 in the Superior court. The premises were offered for sale February 16, 1933 and bid in by Russell Firebaugh as trustee. Certain bonds

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Upon consideration of the appeal on its merits, it appears from the pleadings and evidence that in July, 1929 Mrs. Hedwich Gertze purchased from one Harst, a dealer in securities, bonds numbered 109 and 110, and paid him the par value thereof, \$200.00 for each of said bonds or a total of \$1000.00. These bonds were part of an issue of 380 bonds in the aggregate principal sum of \$98,500.00, evidencing an indenture on improved property described as Taylor Apartments in Chicago, secured by a trust deed under which Russell Firebaugh was designated as trustee. The property was subsequently foreclosed, and a decree of foreclosure and sale was entered December 23, 1930 in the Superior Court. The premises were offered for sale February 16, 1933 and bid in by Russell Firebaugh as trustee. Certain bonds

aggregating \$92,600.00 were deposited with respondent as master in partial payment of the bid. Bonds 109 and 110 were not so deposited with the master. From the master's supplemental report it appears that there were undeposited bonds in the principal sum of \$5900.00, including bonds numbered 109 and 110 for \$500.00 each. The master stated that holders of nondeposited bonds were entitled to receive \$88.09 for each \$100.00 bond and were to be paid their proportionate share of monies deposited with him on account of the deficiency. He made no accounting as to the monies received by him for the nondepositing bondholders, but admits that he received \$4,800.00, somewhat less than the aggregate amount of nondeposited bonds.

Mrs. Gertze testified that she retained bonds numbered 109 and 110 in her possession continuously from July 1929, when they were purchased, until May 1943, when she sold them to the Union Trust Bank for the sum of \$400.00, which was paid to her, and in confirmation of her earlier assignment on May 3, 1943 of the proceeds in the master's hands, she did, on October 22, 1943, expressly assign in writing to the Union Trust Bank, the petitioner, all her rights as the holder of bonds numbered 109 and 110 to the proceeds of sale held in the hands of respondent as master in chancery of the Superior court.

Respondent was the master in chancery in the foreclosure proceedings and conducted the sale of the property under the decree for the sum of \$93,000.00. His report shows that bonds aggregating \$92,600.00 were deposited with him in payment of the bid, and the precise numbers of the bonds are set out in his report, which appears in evidence. Bonds numbered 109 and 110 were never deposited with respondent as master and did not comprise any part of the bonds aggregating \$92,600.00 which were deposited with him. His supplemental report shows that

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aggregating \$2,600.00 were deposited with respondent as master in partial payment of the bid. Bonds 109 and 110 were not so deposited with the master. From the master's supplemental report it appears that there were undeposited bonds in the principal sum of \$2900.00, including bonds numbered 109 and 110 for \$500.00 each. The master stated that holders of nondeposited bonds were entitled to receive \$32.09 for each \$100.00 bond and were to be paid their proportionate share of monies deposited with him on account of the deficiency. He made no accounting as to the monies received by him for the nondepositing bondholders, but admits that he received \$4,800.00, somewhat less than the aggregate amount of nondeposited bonds.

Mrs. Gentze testified that she retained bonds numbered 109 and 110 in her possession continuously from July 1929, when they were purchased, until May 1943, when she sold them to the Union Trust Bank for the sum of \$400.00, which was paid to her, and in confirmation of her earlier assignment on May 3, 1943 of the proceeds in the master's hands, she did, on October 22, 1943, expressly assign in writing to the Union Trust Bank, the petitioner, all her rights as the holder of bonds numbered 109 and 110 to the proceeds of sale held in the hands of respondent as master in chancery of the Superior court.

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holders of nondeposited bonds of the aggregate of \$5900.00 were entitled to the sum of \$5197.52 in cash, or \$88.09 for each \$100.00 bond. Accordingly bonds numbered 109 and 110, each in the sum of \$500.00, aggregating \$1000.00, were entitled to a proportionate distribution of \$880.90. It must be assumed that the master received the money for the nondeposited bonds because there is no countervailing proof or denial of the fact, and therefore the owner and holder of the bonds is entitled to the pro rata share of the money deposited with the master.

Respondent's answer denied that petitioner is a duly organized and existing banking corporation, and averred that "there has never been any Union Trust Bank organized in the State of Illinois," denied that Union Trust Bank is a corporation, and averred that the articles of incorporation of the bank, "if it is such a corporation," have never been filed in the Recorder's office of Cook County, Illinois, and that by reason thereof "the said alleged corporation has no right or authority to file the petition herein or for any relief in the Courts of this State." As against these averments it appears from exhibits and court records received in evidence that in June 1942 a complaint in the nature of quo warranto was filed in behalf of the people of the State of Illinois by the attorney general of the state in the Circuit court of Du Page county, questioning the organization and existence of the Cloverdale State Bank (whose name was subsequently changed to Union Trust Bank), and pursuant to evidence presented in open court and the arguments of counsel, a decree was entered on June 12, 1942 by Judge William J. Fulton, who was then the judge of the Circuit court of Du Page county, as follows:

"1. That the Cloverdale State Bank is organized as a banking corporation under an act entitled 'An Act to Revise

holders of nondeposited bonds of the aggregate of \$500.00 were entitled to the sum of \$127.25 in cash, or \$88.00 for each \$100.00 bond. Accordingly bonds numbered 109 and 110, each in the sum of \$500.00, aggregating \$1000.00, were entitled to a proportionate distribution of \$880.00. It must be assumed that the master received the money for the nondeposited bonds because there is no countervailing proof or denial of the fact, and therefore the owner and holder of the bonds is entitled to the pro rata share of the money deposited with the master.

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"1. That the Cloverdale State Bank is organized as a banking corporation under an act entitled 'AN Act to Revise

the Law with Relation to Banks and Banking," and a charter to said Cloverdale State Bank was issued by the Auditor of Public Accounts of the State of Illinois on December 3, 1920.

"On July 6, 1922, the Auditor of Public Accounts of the State of Illinois issued his permit to do banking business to said Cloverdale State Bank; that said charter was, on July 8, 1922, duly filed for record in the Recorder's Office of DuPage County, Illinois, in Book 11 of Miscellaneous Records on Page 521, as Document Number 157259; that said permit was duly filed for record in the Recorder's Office of DuPage County on July 8, 1922, in Book 11 of Miscellaneous Records on Page 521, as Document 157260.

"2. That during the year Nineteen hundred ~~and~~ twenty-nine, the said bank was properly and lawfully removed to Roselle, Illinois.

"3. That on June 30, 1930, the Stockholders of the said bank, Adopted a Resolution, to Change the Place of Business of the said Bank, to the Unincorporated Area, in Proviso Township, in Cook County, Illinois, without and between the boundaries of the Corporate Limits of the Village of River Forest and Maywood, in the vicinity of Lake street, First avenue and the Desplaines River.

"4. That the Place of Business of the Bank was prior to November 4, 1930, properly and legally changed from the Village of Roselle, Illinois to the Unincorporated Area, in Proviso Township, in Cook County, Illinois, without and between the boundaries of the Corporate Limits of the Villages of River Forest and Maywood, in the vicinity of Lake street, First avenue and the Desplaines River.

"5. That on September 23, 1936, the name of the said bank was properly, regularly and legally changed by the

the law with relation to banks and banking," and a charter to said Cloverdale State Bank was issued by the Auditor of Public Accounts of the State of Illinois on December 3, 1930.

"On July 6, 1932, the Auditor of Public Accounts of the State of Illinois issued his permit to do banking business to said Cloverdale State Bank; that said charter was, on July 8, 1932, duly filed for record in the Recorder's Office of DuPage County, Illinois, in Book 11 of Miscellaneous Records on page 511, as Document Number 17529; that said permit was duly filed for record in the Recorder's Office of DuPage County on July 8, 1932, in Book 11 of Miscellaneous Records on page 511, as Document 17530.

"2. That during the year nineteen hundred and twenty-nine, the said bank was properly and lawfully removed to Roselle, Illinois.

"3. That on June 30, 1930, the stockholders of the said bank, adopted a resolution, to change the place of business of the said bank, to the Unincorporated area, in Providence Township, in Cook County, Illinois, without and between the boundaries of the Corporate Limits of the Village of River Forest and Maywood, in the vicinity of Lake Street, First Avenue and the Desplaines River.

"4. That the place of business of the Bank was prior to November 4, 1930, properly and legally changed from the Village of Roselle, Illinois to the Unincorporated area, in Providence Township, in Cook County, Illinois, without and between the boundaries of the Corporate Limits of the Village of River Forest and Maywood, in the vicinity of Lake Street, First Avenue and the Desplaines River.

"5. That on September 25, 1936, the name of the said bank was properly, regularly and legally changed by the

stockholders thereof to Union Trust Bank.

"6. That the conduct and operation of said bank has been in strict accordance with the terms of said charter and in strict accordance with the statutes of the State of Illinois.

"7. That the said bank has been conducted in a lawful, proper, legitimate manner serving the general banking public.

"8. That all of the issues presented in the complaint herein, and by the answer filed thereto, were determined and adjudicated contrary to the contentions of the People of the State of Illinois, in Case Number 58805 in the Circuit Court of Sangamon County, entitled 'Cloverdale State Bank, a Corporation, vs. Oscar Nelson, Auditor of Public Accounts of the State of Illinois.'

"It Is, Therefore, Ordered and Adjudged that the complaint in the nature of a Quo Warranto heretofore filed herein be and the same is hereby dismissed and that the respondent have and recover its costs and charges in this behalf expended."

The attorney general, representing the people of the State of Illinois, sought leave to appeal to the Appellate court from the order thus entered by the Circuit court of Du Page county, but the application was denied and the judgment of the Circuit court was made final. In view of the foregoing record, further comment as to the averments in respondent's answer challenging the existence of the Union Trust Bank and its authority to file the petition, would seem unnecessary.

The remaining defense interposed in respondent's answer may be summarized as follows: he denied that the bank had on May 3, 1943 or at any other time purchased bonds numbered 109 and 110, and he averred, on the contrary, that said bonds

stockholders thereof to Union Trust Bank.

"6. That the conduct and operation of said bank has been in strict accordance with the terms of said charter and in strict accordance with the statutes of the State of Illinois.

"7. That the said bank has been conducted in a lawful, proper, legitimate manner saving the general banking public.

"8. That all of the issues presented in the complaint herein, and by the answer filed thereto, were determined and adjudicated contrary to the contentions of the People of the State of Illinois, in Case Number 3307 in the Circuit Court of Sangamon County, entitled "People of the State Bank, a Corporation, vs. Great Western, Master of Public Accounts of the State of Illinois."

"9. Therefore, Ordered and Adjudged that the complaint in the nature of a quo warranto heretofore filed herein be and the same is hereby dismissed and that the respondent have and recover its costs and charges in this behalf

expended."

The attorney general, representing the people of the State of Illinois, sought leave to appeal to the appellate court from the order times entered by the Circuit Court of Du Page County, but the application was denied and the judgment of the Circuit Court was made final. In view of the foregoing record, further comment as to the events in respondent's answer challenging the substance of the Union Trust Bank and its authority to file the petition, would seem unnecessary.

The remaining issues interposed in respondent's answer may be summarized as follows: he denied that the bank had on May 3, 1943 or at any other time purchased bonds numbered 109 and 110, and he averred, on the contrary, that said bonds

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were deposited with him as part of the purchase price at the time of the sale under foreclosure, and that he had deposited said bonds, together with many others, as part of the purchase price with the clerk of the Superior court, but that bonds numbered 109 and 110 were stolen from the files by persons unknown, and that the bank therefore had no title to the bonds or any right to the funds deposited with him for nondepositing bondholders. Respondent's supplemental report is a sufficient answer to these allegations because, as heretofore stated, his report, which appears of record, shows that bonds numbered 109 and 110 were never deposited with him as master and did not comprise any part of the bonds aggregating \$92,600.00 which were deposited and accepted by him in payment of the purchase price at the sale. The averment that bonds numbered 109 and 110 were stolen is not supported by any evidence and is entirely refuted by the testimony of Mrs. Gertze, who stated without contradiction that she purchased said bonds in 1929 and retained possession thereof from that time until May 1943, when she sold them to the Union Trust Bank for \$400.00.

Respondent's brief upon the merits of the controversy affords scant enlightenment. Petitioner's counsel says that it "barely exceeds the dignity of mere epithet." So far as we are able to understand, the principal defense is that the whole background is irregular; that the bank has no banking facilities, maintains only a post-office box in Maywood, that the president's office is in the La Salle Hotel, that the bank has no employees other than its president, secretary and treasurer, and that in August 1943 the president informed the auditor of public accounts that the bank was unable to carry on a banking business, as authorized by its charter, and stated that the books and records of the bank did not disclose any current operations. Even if true, these circumstances would not preclude petitioner from

were deposited with him as part of the purchase price at the time of the sale under foreclosure, and that he had deposited said bonds, together with many others, as part of the purchase price with the clerk of the Superior Court, but that bonds numbered 109 and 110 were stolen from the files by persons unknown, and that the bank therefore had no title to the bonds or any right to the funds deposited with him for nondepositing bondholders. Respondent's supplemental report is a sufficient answer to these allegations because, as heretofore stated, his report, which appears of record, shows that bonds numbered 109 and 110 were never deposited with him as master and did not comprise any part of the bonds aggregating \$92,600.00 which were deposited and accepted by him in payment of the purchase price at the sale. The averment that bonds numbered 109 and 110 were stolen is not supported by any evidence and is entirely refuted by the testimony of Mrs. Getz, who stated without contradiction that she purchased said bonds in 1929 and retained possession thereof from that time until May 1943, when she sold them to the Union Trust Bank for \$400.00. Respondent's brief upon the merits of the controversy affords scant enlightenment. Petitioner's counsel says that it "barely exceeds the dignity of mere epithet." So far as we are able to understand, the principal defense is that the whole background is irregular; that the bank has no banking facilities, maintains only a post-office box in Maywood, that the president's office is in the La Salle Hotel, that the bank has no employees other than its president, secretary and treasurer, and that in August 1943 the president informed the auditor of public accounts that the bank was unable to carry on a banking business, as authorized by its charter, and stated that the books and records of the bank did not disclose any current operations. Even if true, these circumstances would not preclude petitioner from

maintaining its cause of action or excuse the master from paying the pro rata share of the bonds owned by the bank from the proceeds of the sale, which he admittedly held. Even if petitioner corporation had been dissolved, it could sue to collect its assets (Commercial Trust Co. v. Mallers, 242 Ill. 50), but no such claim is asserted as a defense.

In support of its claim, L. A. Mitchell, president of the Union Trust Bank, supplemented the documentary evidence by oral testimony. He stated that he started in the banking business with the First National Bank of Chicago in 1917 and had been president of the Cloverdale State Bank since 1936 and of the Union Trust Bank since the name was changed; that the bank was first located in Cloverdale and then in Roselle, Illinois; that the bank has a secretary, a treasurer, and a corporate seal of which the cashier is custodian, and that he (Mitchell) as president resides at the La Salle Hotel in Chicago; that the bank is incorporated for \$10,000.00, has assets in the aggregate of \$15,000.00 or \$17,000.00, and conducts a limited banking business under his direction. In the course of the trial respondent called John W. F. Smith, a bank examiner for the auditor of public accounts, who testified that under date of August 20, 1943 he received a letter on the letterhead of the Union Trust Bank, signed by its president, L. A. Mitchell, as follows:

"In reply to your letter of August 12, 1943, I wish to advise that since no suitable building is available in the authorized area in which the Union Trust Bank can operate, and since it is impossible because of the war condition to construct a building at this time, the Union Trust Bank is unable to assume a banking business as authorized by its charter and laws of the State of Illinois. The books and records, however, of the Union Trust Bank are available for your inspection at such time and

maintaining its cause of action or excuse the matter from paying the pro rata share of the bonds owned by the bank from the proceeds of the sale, which he admittedly held. Even if petitioner corporation had been dissolved, it could sue to collect its assets (Commercial Trust Co. v. Illinois, 242 Ill. 50), but no such claim is asserted as a defense. In support of its claim, L. A. Mitchell, president of the Union Trust Bank, supplemented the documentary evidence by oral testimony. He stated that he started in the banking business with the First National Bank of Chicago in 1917 and had been president of the Cloverdale State Bank since 1936 and of the Union Trust Bank since the name was changed; that the bank was first located in Cloverdale and then in Roselle, Illinois; that the bank has a secretary, a treasurer, and a corporate seal of which the cashier is custodian, and that he (Mitchell) as president resides at the La Salle Hotel in Chicago; that the bank is incorporated for \$10,000.00, has assets in the aggregate of \$15,000.00 or \$17,000.00, and conducts a limited banking business under his direction. In the course of the trial respondent called John W. Smith, a bank examiner for the auditor of public accounts, who testified that under date of August 20, 1943 he received a letter on the letterhead of the Union Trust Bank, signed by its president, L. A. Mitchell, as follows:

"In reply to your letter of August 12, 1943, I wish to advise that since no suitable building is available in the authorized area in which the Union Trust Bank can operate, and since it is impossible because of the war condition to construct a building at this time, the Union Trust Bank is unable to assume a banking business as authorized by its charter and laws of the State of Illinois. The books and records, however, of the Union Trust Bank are available for your inspection at such time and

place as you may designate. These books and records will not disclose any current operations, since the bank has accepted no deposits for some time. But whatever banking transactions have been made in the past are available for your inspection." This letter affords some explanation of the reason why the bank had no banking quarters, but that circumstance would not preclude it from asserting its claim to the pro rata share of bonds numbered 109 and 110.

The trial of the cause was only partly concluded. The chancellor seemed to be exercised over the fact that Russell Firebaugh, whose reliability he questioned, had been instrumental in calling Mitchell's attention to the availability of Mrs. Gertze's bonds, and by reason thereof he apparently entertained some doubt that the Union Trust Bank was the rightful owner of these bonds. Therefore in the midst of the proceeding he terminated the hearing abruptly by discharging the rule and dismissing the petition. Respondent does not complain about this course of procedure, but seeks to justify it on the same theory that the chancellor adopted, namely, that the whole proceeding was fraudulent, a "hold-up," and "one of the rottenest things that have come before me," supported by the contention that "A court of equity has inherent power to dismiss an action in fraud of justice, or actions which are merely groundless, vexatious and harassing." It may be conceded that Firebaugh called Mitchell's attention to the fact that these bonds could be purchased and assisted the Union Trust Bank in acquiring them, but these circumstances cannot and certainly should not operate to defeat the claim of the Union Trust Bank which paid a valuable consideration for the bonds. Although the proceeding was not fully heard, there is abundant evidence of record to support a money decree, as prayed by petitioner, especially in view of the fact that respondent does not complain of the

place as you may designate. These books and records will not disclose any current operations, since the bank has accepted no deposits for some time. But whatever banking transactions have been made in the past are available for your inspection." This latter affords some explanation of the reason why the bank had no banking quarters, but that circumstance would not preclude it from asserting its claim to the proceeds of bonds numbered 109 and 110.

The trial of the case was only partly concluded. The Chancellor seemed to be exercised over the fact that Mitchell, whose reliability he questioned, had been instrumental in calling Mitchell's attention to the availability of Mrs. Gertze's bonds, and by reason thereof he apparently retained some doubt that the Union Trust Bank was the rightful owner of these bonds. Therefore in the night of the proceeding he terminated the hearing abruptly by discharging the rule and dismissing the petition. Respondent does not complain about this course of procedure, but seeks to justify it on the same theory that the Chancellor adopted, namely, that the whole proceeding was fraudulent, a "hold-up," and one of the rottenest things that have come before me," supported by the contention that "A court of equity has inherent power to dismiss an action in fraud of justice, or actions which are merely groundless, vexatious and harassing." It may be conceded that Mitchell called Mitchell's attention to the fact that these bonds could be purchased and assigned to the Union Trust Bank in securing them, but these circumstances cannot and certainly should not operate to defeat the claim of the Union Trust Bank which paid a valuable consideration for the bonds. Although the proceeding was not fully heard, there is abundant evidence of record to support a money decree, as prayed by petitioner, especially in view of the fact that respondent does not complain of the

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abrupt termination of the case or ask that he be allowed to produce further evidence. Therefore, the decree of the Superior court is reversed and the cause is remanded with directions that a decree be entered requiring respondent, the master, to pay petitioner the amount allocable to its bonds.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

to produce further evidence. Therefore, the degree of
the reporter count is reversed and the cause is remanded
with directions that a degree be entered reflecting
responsibility, the master, to pay petitioner the amount
allocable to its bonds.

REVEREND WITH DIRECTIONS
DEGREE REVEREND AND CAUSE

Seaman and Sullivan, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

43276

ROSE CIPICH,
Appellant,

v.

CITY OF CHICAGO, a
municipal corporation,
Appellee.

709 A
APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

328 I.A. 580

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On the evening of September 25, 1941 plaintiff fell into a large unlighted hole in the sidewalk on East 91st street in the City of Chicago and was severely injured. Two months thereafter, on November 25, 1941, what purports to be a statutory notice, drawn in the technical language of the statute but not signed by plaintiff, her agent or attorney, was served upon the city. Thereafter on January 19, 1942, which was six days less than four months after the accident, plaintiff filed her signed complaint in the Superior court, accompanied by her affidavit wherein she deposes and says that she had read the complaint by her subscribed, that she knew the contents thereof and that it was true in substance and in fact. Upon trial before a jury plaintiff offered the defective notice in evidence, upon which the court reserved its ruling, and adduced evidence as to the manner in which the accident occurred, the condition of the sidewalk and the injuries sustained by her. At the close of plaintiff's case the city moved for an instructed verdict on the ground that the notice was defective. The court granted the motion, directed a verdict for defendant and entered the judgment from which plaintiff appeals.

With respect to personal actions against municipalities sections 1-11 and 1-12, chapter 24, Ill. Rev. Stat. 1943, provide as follows:

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sections 1-11 and 1-12, chapter 24, Ill. Rev. Stat. 1943,

With respect to personal actions against municipalities

judgment from which plaintiff appeals.

the notion, directed a verdict for defendant and entered the ground that the notice was defective. The court granted plaintiff's case the city moved for an instructed verdict on sidewalk and the injuries sustained by her. At the close of manner in which the accident occurred, the condition of the the court reserved its ruling, and adduced evidence as to the plaintiff offered the defective notice in evidence, upon which was true in substance and in fact. Upon trial before a jury subscribed, that she knew the contents thereof and that it deposes and says that she had read the complaint by her

Superior court, accompanied by her affidavit wherein she

the accident, plaintiff filed her signed complaint in the

19, 1942, which was six days less than four months after

attorney, was served upon the city. Thereafter on January

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On the evening of September 25, 1941 plaintiff fell

MR. PRESIDING JUSTICE KRIND DELIVERED THE OPINION OF THE COURT.

Appellee,
CITY OF CHICAGO, a
municipal corporation,
v.
ROSE GIBSON, Appellant,

43276

328 I.A. 580

COOK COUNTY.

APPEAL FROM SUPERIOR COURT,

"1-11. Notice within six months.) Within six months from the date that such an injury was received or such a cause of action accrued, any person who is about to commence any civil action in any court against any municipality for damages on account of any injury to his person shall file in the office of the city attorney, if there is a city attorney, and also in the office of the municipal clerk, either by himself, his agent, or attorney, a statement in writing, signed by himself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, and the name and address of the attending physician, if any.

"1-12. Dismissal of suit if no notice filed.) If the notice provided for by section 1-11 is not filed as provided in that section, any such civil action commenced against any municipality shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from further suing."

Under the established rule in this state where any of the essential elements of the notice are omitted motion of defendant for a directed verdict should be allowed. Quimette v. City of Chicago, 242 Ill. 501; Keller v. Tomaska, 299 Ill. App. 34; Minnis v. Friend, 360 Ill. 328. It is urged however that as a result of the injury sustained plaintiff was rendered non compos mentis and should therefore be excused from serving the required statutory notice. Plaintiff's counsel rely principally on McDonald v. City of Spring Valley, 285 Ill. 52, to support this contention. In that case Margaret McDonald,

"I-11. Notice (within six months). Within six months

from the date that such an injury was received or such a cause of action accrued, any person who is about to commence any civil action in any court against any municipality for damages on account of any injury to his person shall file in the office of the city attorney, if there is a city attorney, and also in the office of the municipal clerk, either by himself, his agent, or attorney, a statement in writing, signed by himself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, and the name and address of the attending physician, if any.

"I-12. Dismissal or writ if no notice filed. If

the notice provided for by section I-11 is not filed as provided in that section, any such civil action commenced against any municipality shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from further suing."

Under the established rule in this state where any of

the essential elements of the notice are omitted motion of defendant for a directed verdict should be allowed. Outgates v. City of Chicago, 242 Ill. 301; Weller v. Tompkins, 293 Ill. App. 3d; Winn v. Trier, 300 Ill. 128. It is urged however that as a result of the injury sustained plaintiff was rendered non compos mentis and should therefore be excused from serving the required statutory notice. Plaintiff's counsel rely principally on McDonald v. City of Spring Valley, 305 Ill. 52, to support this contention. In that case Margaret McDonald,

aged seven, by her next friend brought suit against the City of Spring Valley for injuries resulting in the loss of the third finger of her left hand. The declaration alleged that on account of her tender years plaintiff did not know and was not informed by anyone of the provisions of the statute concerning suits at law for personal injury against cities, villages and towns and that on account of her tender years and her physical and mental incapacity it was impossible for her to give notice or to comprehend the requirements of the statute. Defendant's demurrer to the declaration admitted the foregoing allegations. The court pointed out that the recognition by the law of the status of infants and their exemption up to a certain age from liability under the law is so well known that it must be presumed that the legislature in enacting such a statute as the one under consideration did not intend by the general language used to include within its provisions a class of persons which the law has recognized as being utterly devoid of responsibility and held that the statute in question does not apply to a child seven years old who is physically and mentally incompetent to give such notice. We followed that decision in Oran v. Kraft-Phenix Cheese Corporation, 324 Ill. App. 463, wherein a minor failed to file a rejection of his right under the Workmen's Compensation Act (Ill. Rev. Stat. 1943, ch. 48, secs. 138 et seq.) within six months from the date of an accident as a condition precedent to enforcing his common-law rights, holding as the court did in the McDonald case that to charge a minor who has no legal guardian with the responsibility of filing a rejection would amount to imposing on him an obligation which he could not possibly perform since he would be incapable of appointing an agent or attorney and could not because of his

aged seven, by her next friend brought suit against the City of Spring Valley for injuries resulting in the loss of the third finger of her left hand. The declaration alleged that on account of her tender years plaintiff did not know and was not informed by anyone of the provisions of the statute concerning suits at law for personal injury against cities, villages and towns and that on account of her tender years and her physical and mental incapacity it was impossible for her to give notice or to comprehend the requirements of the statute. Defendant's demurrer to the declaration admitted the foregoing allegations. The court pointed out that the recognition by the law of the status of infants and their exemption up to a certain age from liability under the law is so well known that it must be presumed that the legislature in enacting such a statute as the one under consideration did not intend by the general language used to include within its provisions a class of persons which the law has recognized as being utterly devoid of responsibility and held that the statute in question does not apply to a child seven years old who is physically and mentally incompetent to give such notice. We followed that decision in Gray v. First-Union Chase Corporation, 324 Ill. App. 403, wherein a minor failed to file a rejection of his right under the Workmen's Compensation Act (Ill. Rev. Stat. 1943, ch. 48, sec. 138 et seq.) within six months from the date of an accident as a condition precedent to enforcing his common-law rights. Holding as the court did in the Reynolds case that to charge a minor who has no legal guardian with the responsibility of filing a rejection would amount to imposing on him an obligation which he could not possibly perform since he would be incapable of appointing an agent or attorney and could not because of his

-4-

age act for himself. In the case at bar however plaintiff was of legal age, married and was accompanied by her husband on the night of the accident. Although she was undoubtedly severely injured either she or her attorney served what purports to be a statutory notice drawn in the technical language of the statute but not signed by her, her agent or attorney. Moreover it appears that approximately two months after this notice was served on the city plaintiff filed her complaint which admittedly bears her signature and a jurat also signed by her saying that she had read the complaint, knew the contents thereof and that it was true in substance and in fact. These circumstances would certainly preclude her from contending that she was non compos mentis and remained so during the entire six-month period during which the notice should have been served. The statute permits the required notice to be signed either by plaintiff, her attorney or agent. Presumably the notice was prepared by her attorney because it appears to be a legal document and conforms in every respect to the requirements of the statute except that it bears no signature. This would indicate that the person who prepared and served the notice was remiss in complying with the statute. The authorities are in accord that such a defect is fatal and requires the court to direct a verdict. The judgment of the Superior court is therefore affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

-4-

age act for himself. In the case at bar however plaintiff was of legal age, married and was accompanied by her husband on the night of the accident. Although she was undoubtedly severely injured either she or her attorney served what purports to be a statutory notice drawn in the technical language of the statute but not signed by her, her agent or attorney. Moreover it appears that approximately two months after this notice was served on the city plaintiff filed her complaint which admittedly bears her signature and a joint also signed by her saying that she had read the complaint, knew the contents thereof and that it was true in substance and in fact. These circumstances would certainly preclude her from contending that she was non compos mentis and remained so during the entire six-month period during which the notice should have been served. The statute permits the required notice to be signed either by plaintiff, her attorney or agent. Presumably the notice was prepared by her attorney because it appears to be a legal document and conforms in every respect to the requirements of the statute except that it bears no signature. This would imply to that the person who prepared and served the notice was unable in complying with the statute. The authorities are in accord that such a defect is fatal and requires the court to direct a verdict. The judgment of the Sup. Ct. is therefore affirmed.

JUDGMENT AFFIRMED.

Geonian and Sullivan, JJ., concur.

43376

CITY OF CHICAGO,
a Municipal Corporation,
Appellee,

v.

GERTRUDE BONN,
Appellant.

210 A
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

328 I.A. 581

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Late in the afternoon of November 20, 1944 the defendant, Mrs. Gertrude Bonn, was arrested in Goldblatt Brothers' Department Store, charged with disorderly conduct while intoxicated, taken to the 11th street and Wabash avenue police station in a patrol wagon, confined in jail that night, and the next morning a verified complaint was filed charging her with improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city, in violation of section 193-1 of the Municipal Code of Chicago of 1939, as amended. She was then brought before the trial judge who examined the complaint and the person presenting it, appended his certification that proper cause existed for filing the complaint, and granted permission to file the same. The defendant having waived a jury trial, the cause was heard by the court, and pursuant to the presentation of evidence defendant was found guilty of violating the ordinance set forth in the complaint and fined five dollars and costs. Subsequently, on December 1, 1944, a motion was filed on her behalf for a new trial and in arrest of judgment. After hearing extensive evidence the court denied the motion and defendant prosecuted this appeal.

In the argument on the "facts" defendant's counsel devotes seven pages of his eighteen-page brief to matters which do not appear in any report of proceedings at the trial but are taken from a report of proceedings had after defendant

CITY OF CHICAGO,
a Municipal Corporation,
Appellee,

v.

GERTRUDE BORN,
Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

328 I.A. 281

MR. PRESIDING JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

late in the afternoon of November 20, 1944 the defend-
 ant, Mrs. Gertrude Born, was arrested in Goldblatt Brothers'
 Department Store, charged with disorderly conduct while in-
 toxiated, taken to the 11th street and Wabash avenue police
 station in a patrol wagon, confined in jail that night, and
 the next morning a verified complaint was filed charging her
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 or diversion tending to a breach of the peace, within the
 limits of the city, in violation of section 193-1 of the
 Municipal Code of Chicago of 1939, as amended. She was then
 brought before the trial judge who examined the complaint and
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 jury trial, the case was heard by the court, and pursuant to
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 violating the ordinance set forth in the complaint and fined
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 denied the motion and defendant prosecuted this appeal.

In the argument on the "facts" defendant's counsel
 devotes seven pages of his eighteen-page brief to matters
 which do not appear in any report of proceedings at the trial
 but are taken from a report of proceedings had after defendant

filed a motion for a new trial and in arrest of judgment.

The principal ground urged for reversal is that "defendant did not knowingly, expressly, or understandingly, waive a jury or right to have counsel." However, the review here is on the common-law record alone which discloses that defendant waived trial by jury on November 21, 1944 when the cause was heard; and that statement in the record imports verity and is conclusive. In City of Chicago v. Harrington, 263 Ill. App. 47, it was held that "the record imports verity and cannot be successfully contradicted by statements in the brief. The defendant having waived his right to a jury trial cannot now be heard to complain that the court tried the case without a jury." The case at bar was not a criminal proceeding in which a written jury waiver is required; it is an action by the city to recover a penalty for the violation of an ordinance in a civil suit. City of Chicago v. Shreffler, 175 Ill. App. 547; City of Chicago v. Knobel, 232 Ill. 112; City of Chicago v. Streeter, 152 Ill. App. 463; and City of Chicago v. Williams, 254 Ill. 360. Therefore, if defendant desired a trial by jury it was incumbent upon her to assert it, not on a motion for a new trial but on November 21 when the hearing was commenced. Rule 59 of the Municipal court provides that in actions where either party is entitled to a jury trial, the case shall be tried without a jury unless a demand in writing for a trial by jury is filed by the plaintiff or by the defendant, and if the demand is made by the defendant it must be filed by him at the time he enters his appearance. The record before us shows no demand by defendant for trial by jury until after the entry of the judgment. It would therefore seem that in view of the recitals in the record explicitly stating that a jury trial was waived and the failure of the

-2-

filed a motion for a new trial and in arrest of judgment.

The principal ground urged for reversal is that

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ing in which a written jury waiver is required; it is an

action by the city to recover a penalty for the violation of

an ordinance in a civil suit. City of Chicago v. Threlkeld,

177 Ill. App. 547; City of Chicago v. Grobel, 232 Ill. 112;

City of Chicago v. Streeter, 152 Ill. App. 453; and City of

Chicago v. Williams, 294 Ill. 360. Therefore, if defendant

desired a trial by jury it was incumbent upon her to assert

it, not on a motion for a new trial but on November 21 when

the hearing was commenced. Rule 39 of the Municipal Court

provides that in actions where either party is entitled to a

jury trial, the case shall be tried without a jury unless a

demand in writing for a trial by jury is filed by the plaintiff

or by the defendant, and if the demand is made by the defendant

it must be filed by him at the time he enters his appearance.

The record before us shows no demand by defendant for trial

by jury until after the entry of the judgment. It would there-

fore seem that in view of the recitals in the record explicitly

stating that a jury trial was waived and the failure of the

defendant to comply with rule 59 of the Municipal court prescribing the method of obtaining a trial by jury in a case where that right exists, the defendant's principal contention is utterly without merit.

The other ground urged by defendant is that she was denied counsel. As a matter of fact she was assigned a public defender who was present in court and stood beside her when she entered her plea of not guilty, and if she had desired her own counsel she should have so stated at that time.

Included in the exhaustive evidence adduced upon the motion for a new trial is the testimony of Irving Landesman, an assistant corporation counsel who was assigned to the women's court, 1121 South State street, where defendant was tried on the morning of November 21. He stated that the clerk asked her if she wanted to be tried by the court or by a jury and that "she nodded, indicating she wanted to be tried by this judge. She nodded up and down, in the affirmative. There is a public defender assigned to that court, a Mrs. Edith Stone, who was standing right there. When the clerk asked Mrs. Bonn if she wanted to plead guilty or not guilty, she talked to Mrs. Stone a minute or two and then Mrs. Stone said 'We plead not guilty.'"

Myron Lewis, an assistant state's attorney who was also assigned to the women's court, corroborated Landesman's testimony. He said that he was standing directly behind Landesman at the bar when defendant's case was called; that Mrs. Bonn, Mrs. Stone and Landesman were standing before the bench when the clerk inquired whether defendant wished to be tried by the judge or a jury, and that Mrs. Stone repeated the question to Mrs. Bonn and then said to the court, "By the judge," and at the same time Mrs. Bonn nodded her head toward the judge. As against

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defendant to comply with rule 7 of the municipal court prescribing the method of obtaining a trial by jury in a case where that right exists, the defendant's principal contention is utterly without merit.

The other ground urged by defendant is that she was denied counsel. As a matter of fact she was assigned a public defender who was present in court and stood beside her when she entered her plea of not guilty, and if she had desired her own counsel she should have so stated at that time. Included in the exhaustive evidence adduced upon the motion for a new trial is the testimony of Irving Landseman, an assistant corporation counsel who was assigned to the women's court, 1321 South State street, where defendant was tried on the morning of November 21. He stated that the clerk asked her if she wanted to be tried by the court or by a jury and that "she nodded, indicating she wanted to be tried by this judge." He nodded up and down, in the affirmative. There is a public defender assigned to that court, a Mrs. Edith Stone, who was standing right there. When the clerk asked Mrs. Bonn if she wanted to plead guilty or not guilty, she talked to Mrs. Stone a minute or two and then Mrs. Stone said "I plead not guilty."

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this evidence defendant testified that "I never waived jury trial and was never asked if I wanted a jury trial." However, the record, which imports verity, contradicts her statement and is supported by the testimony of several witnesses.

The foregoing conclusion would seem to dispose of the controversy, but defendant's counsel has brought up a record of some 200 pages containing evidence taken on defendant's motion for a new trial and devotes a considerable portion of his brief to a discussion of the facts, and argument that the finding of the trial court is contrary to the manifest weight of the evidence. Briefly summarized, the evidence adduced upon the hearing by numerous witnesses indicates that defendant was found intoxicated in Goldblatt Brothers' store; that she used abusive language to the police officers and struck one of them in the face with her handbag when he attempted to persuade her to enter a cab and go home quietly. Kratzmeyer, one of the police officers, testified that he found her in the men's shoe department, sitting with her dress up about half way to her hips, and that she used very vile and abusive language. When he asked her what the trouble was, she said "None of your damn business," and when he asked her name, she responded "You are so damned smart, why don't you find out who I am?" He testified further that when he ultimately told her he would have to arrest her she said "Go ahead, that's just what I want, I am going to sue this damned store and I am going to make them pay." Kratzmeyer gave it as his unqualified opinion that she was intoxicated.

Officer Keating stated that when he asked her who she was she said "You are a God damned copper, you ought to be able to find out who I am," and when they suggested to her that she take a cab and go home, she said "I dare you to lock

-4-

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me up." He further testified that she was intoxicated, that she was hardly able to walk by herself, that they had to lead her by the arm to get her out, and that she hit him across the face and bent his glasses.

Frank Welch, a detective employed by Joyce Detective Agency, testified that Goldblatt Brothers' Department Store bar refused to sell defendant a drink, that she fought with a colored girl at the bar, screamed and used vile language. Janet Devine and Harold Greenwald, also employees of the Joyce Detective Agency, corroborated the evidence that Mrs. Bonn was creating a disturbance in the store, that she was intoxicated, and that they finally had to lead her from the store.

Mrs. Bonn's testimony is entirely at variance with that of every other witness. She said that she was waiting for her sister, did some shopping on another floor, and because her feet were tired and her back hurt she found a seat in a secluded spot in the men's shoe department on the first floor near the Van Buren street entrance; that she had previously purchased a bag of beans in the basement, and while she was sitting there the police officers accosted her and accused her of being a shoplifter; that she did not know who the police officers were and said to them "Who the hell are you?"; that one of them then jerked her up from her seat and spilled the beans. She denied that she had been drinking or disorderly or guilty of breach of the peace, and said that she had not taken intoxicating liquor for the past five years. Subsequently plaintiff's attorneys confronted her with the testimony of two police officers. One of them, Joseph Reuter, stated that about six weeks prior thereto he received a call from defendant's husband saying that, scantily dressed, she had gone down the back stairs from the eighth or tenth floor of their

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apartment building, and could not be found; that he and his partner, John Reilly, toured the neighborhood and found defendant in an intoxicated condition, sitting on the bumper of a car at 71st street and Jeffery avenue; that it was a cool evening in November but defendant wore only a dress and no hat; that they took her home and from there, at her husband's request, drove her to the Michael Reese Hospital in his car, where she was refused admittance in the emergency ward because of her intoxicated condition.

Because there is no transcript of the testimony adduced at the original proceeding, we must assume that the evidence supports the judgment; nevertheless, it would hardly seem necessary to rely on the presumption in view of the overwhelming testimony contained in the record and here briefly summarized. The trial court could not fairly have entered any other order except to deny the motion for a new trial upon the evidence presented. Defendant has already had two hearings, and there is nothing in her brief which would justify her contention that she should have another trial. The judgment of the court is therefore affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

apartment building, and could not be found; that he and his partner, John Kelly, toured the neighborhood and found the defendant in an intoxicated condition, sitting on the bumper of a car at 71st street and Jeffery Avenue; that it was a cool evening in November but defendant wore only a dress and no hat; that they took her home and from there, at her husband's request, drove her to the Michael Reese Hospital in his car, where she was refused admittance in the emergency ward because of her intoxicated condition.

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JUDGMENT AFFIRMED.

Conlan and Sullivan, JJ., concur.

43398

M. M. GORDON and P. GORDON,
Appellees,

v.

VICTOR C. BREYTSPRAAK,
Appellant.

211
APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

323 I.A. 581²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued to recover the sum of \$1000.00 alleged to have been advanced to defendant in consideration of the signing of an agreement, which was never consummated, by him and Dr. W. H. Eddy, relating to the manufacture and sale of a vitamin product called "Vitalert." Trial by the court without a jury resulted in finding and judgment in favor of plaintiffs for \$1000.00, from which defendant has taken an appeal.

It appears that early in 1939 Dr. Eddy, who had been connected with Columbia University for 36 years teaching nutrition and physiological chemistry, devised a vitamin formula or product called "Vitalert." The defendant, Victor C. Breytspraak, a specialist in advertising, conceived and prepared a merchandising plan to sell said product through haberdasheries, cigar counters and other places catering especially to men, a set-up similar to that used in marketing "Vitamin Plus," which had been distributed, with considerable success, to a predominantly feminine trade through beauty shops and cosmetic sections of department stores, instead of through the usual drug-store channels. Breytspraak was convinced that his plan for advertising and distributing "Vitalert" had great possibilities for profitable outlets, and had discussed the matter with Norman Phelps, Chicago manager of Buchanan & Co., Inc., an advertising concern, which desired to handle the account when "Vitalert"

43398

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325 I.A. 281

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was placed on the market. Phelps introduced Breyspraak to M. M. Gordon and his wife, Pat Gordon, who together had established a profitable business in the preparation and sale of cosmetics under the name of "Princess Pat." Thereafter the Gordons, Phelps and Breyspraak had several meetings, during which they discussed the possibilities of "Vitalert." The Gordons were impressed with Breyspraak's merchandising plan, but wanted to be assured that they would not encounter any difficulties with the American Medical Association and that the product would not conflict with the provisions of the Federal Pure Food and Drug laws. They knew of Dr. Eddy and felt that he could eliminate all trouble by making bioassay tests of the product which both the American Medical Association and the Federal Government would recognize and approve. Accordingly, the Gordons met Dr. Eddy and Breyspraak by pre-arrangement at the Savoy-Plaza Hotel in New York City the latter part of March 1939. The proposed plan was fully discussed, and an oral agreement was there made to purchase the exclusive right to manufacture "Vitalert" according to Dr. Eddy's formula and market it under Breyspraak's plan. The Gordons agreed to pay an aggregate sum in royalties, which according to Eddy and Breyspraak totaled \$50,000.00 and according to Mrs. Gordon's recollection amounted to \$35,000.00. These royalties were to be five cents on each package of "Vitalert" sold until Eddy and Breyspraak received the sum of \$10,000.00; then four cents a package until the royalties amounted to another \$10,000.00; then three cents, then two cents, then one cent a package until the full amount was paid, whereupon the formula and the merchandising plan would become the exclusive property of the Gordons.

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By agreement of the parties a written draft of the contract was to be prepared by the Gordons' attorney. The Gordons were anxious to launch the project before someone else conceived the idea of merchandising and selling vitamins for men according to Breytspraak's plan. After the meeting at the Savoy-Plaza, Breytspraak took the Gordons to the International Vitamin Company, where they consulted Dr. Laborski as to the purchase of ingredients. The Gordons then returned to Chicago. On their way to the railroad station in New York they had a conversation with Breytspraak, about which there is considerable conflict. Breytspraak testified that the Gordons wanted him to canvass the market, make advance contacts with retailers and help secure the necessary ingredients; that he assured the Gordons he would be willing to do so if they would pay him \$1000.00 for his services; and that they consented to do so. The Gordons' version of the conversation is that Breytspraak told them that he needed some ready cash and asked them to advance \$1000.00 to him in consideration of his and Dr. Eddy's signature to the contract when drawn, and on the assurance that "you may rest assured that any contract you might write within reason will be signed by Dr. Eddy and myself." In any event, when the Gordons returned to Chicago they sent Breytspraak a letter prepared by their attorney, with enclosure of a check for \$1000.00 payable to Breytspraak and Dr. Eddy, the material portions of which are as follows:

"I am enclosing you herewith check to the order of yourself and Dr. Eddy for \$1000.00.

"We just returned to Chicago today, and this afternoon went to our attorney to draw a contract. He wanted a couple of days to do this, and then to send it to a Bank or lawyer in New York to have it signed by you and Dr. Eddy

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"We just returned to Chicago today, and this afternoon went to our attorney to draw a contract. He wanted a couple of days to do this, and then to send it to a Bank or lawyer in New York to have it signed by you and Dr. Eddy.

and returned at the time of delivery of the check.

"I told him that this perhaps was legally necessary, but that I had such confidence in you and Dr. Eddy that I was willing to send you the check tonight without the contract even being drawn, because you said you needed the check so badly and that I could take your word for it, as you stated in New York, that any contract we drew along the lines of our talk and that we thought was fair, would be signed by you and Dr. Eddy.

"Tomorrow, Saturday, is a short day, and it may take until Monday before a contract is drawn by our attorney. We will then send it to you, and you and Dr. Eddy can sign and return it to us. It occurs to me that there might be some additions to any contract of any kind which you would want to make. It will be impossible for us - sight unseen - to agree in advance to make any additions before seeing and considering them; therefore, whatever contract we approve here will have to be signed by both of you there in order to have a deal closed. However, you know that we desire to be fair, and we are perfectly willing, afterwards, to give due consideration to any suggestions that you may have."

Dr. Eddy indorsed the check and turned it over to Breyspraak, who put it through his bank and kept the proceeds thereof. With respect to this phase of the transaction Dr. Eddy testified by deposition as follows: "The Gordons said they wanted Mr. Breyspraak to continue the canvass of possible outlets for the product. Mr. Breyspraak said that he would make such a survey, which he subsequently did, providing the Gordons would, on their return to Chicago, make an advance payment of \$1,000 to cover such services. They said they would send a check for \$1,000 made out to me and Mr. Breyspraak, jointly, to apply on the contract they were having drawn up. I said

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"I told him that this perhaps was legally necessary, but that I had such confidence in you and Dr. Eddy that I was willing to send you the check tonight without the contract even being drawn, because you said you needed the check so badly and that I could take your word for it, as you stated in New York, that any contract we drew along the lines of our talk and that I thought was fair, would be signed by you and Dr. Eddy.

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Dr. Eddy interest the check and turned it over to Preysapack, who put it through his hands and kept the proceeds thereof.

With respect to this phase of the transaction Dr. Eddy testified by deposition as follows: "The Gordons said they wanted Mr. Preysapack to continue the canvass of possible outlets for the product. Mr. Preysapack said that he would make such a survey, which he subsequently did, providing the Gordons would, on their return to Chicago, make an advance payment of \$1,000 to cover such services. They said they would send a check for \$1,000 made out to me and Dr. Preysapack, jointly, to apply on the contract they were having drawn up. I said

since the work was to be done entirely by Mr. Breytspraak I would turn over my half of the check to him for that purpose. The Gordons said this was satisfactory. They sent this \$1,000 check payable to Walter H. Eddy and Victor C. Breytspraak. I endorsed the check over to Mr. Breytspraak and gave it to him." Gordon's letter enclosing the \$1000.00 check was dated March 24, 1939. The next day Mrs. Gordon addressed another letter to Breytspraak, wherein she said that their attorney, in contemplation of preparing the contract, wanted additional information as to how far Dr. Eddy would be willing to allow the use of his name in certifying the potency of the vitamin tablets contained in each package, and she also wished to have Breytspraak verify her understanding that Dr. Eddy would undertake all bioassays of the initial and future batches or orders of the special formula and assume the responsibility for having all the literature, labels, packages, etc. approved at Washington, without additional expense to the Gordons.

Breytspraak evidently turned this letter over to Dr. Eddy, because on March 26 he informed Mrs. Gordon as to the extent to which his name could be used in connection with the "Vitalert" project, and at the same time he advised her that he would undertake all bioassays and render such service without expense other than his interest in the royalties.

When the contract was ultimately prepared several weeks later and forwarded to Breytspraak for his ~~own~~ and Dr. Eddy's signature, Dr. Eddy immediately notified the Gordons that the agreement "changed materially the terms agreed upon at the Savoy Plaza in this respect: it made the royalties payable out of the net profits, while our terms agreed upon at the Savoy Plaza called for payment out of each and every gross

since the work as to be done entirely by Dr. Breyfuss. I would turn over my half of the check to him for that purpose. The Gordons said this was satisfactory. They sent this \$1,000 check payable to Walter H. Bady and Victor O. Breyfuss. I endorsed the check over to Dr. Breyfuss and gave it to him. Gordon's letter enclosing the \$100,000 check was dated March 24, 1939. The next day Mrs. Gordon addressed another letter to Breyfuss, wherein she said that their attorney, in contemplation of preparing the contract, wanted additional information as to how far Dr. Bady would be willing to allow the use of his name in certifying the potency of the vitamin tablets contained in each package, and she also wished to have Breyfuss verify her understanding that Dr. Bady would undertake all bioassays of the initial and future batches or orders of the special formula and assume the responsibility for having all the literature, labels, packages, etc. approved at Washington, without additional expense to the Gordons. Breyfuss evidently turned this letter over to Dr. Bady, because on March 26 he informed Mrs. Gordon as to the extent to which his name could be used in connection with the "Vitamin" project, and at the same time he advised her that he would undertake all bioassays and render such service without expense other than his interest in the royalties. When the contract was ultimately prepared several weeks later and forwarded to Breyfuss for his signature, Dr. Bady's signature, Dr. Bady immediately notified the Gordons that the agreement "changed materially the terms agreed upon at the Bady Plans in this respect: it made the royalties payable out of the net profits, while our terms agreed upon at the Bady Plans called for payment out of each and every gross

sale, beginning with the very first package sold." These changes were considered vital to both Breytspraak and Dr. Eddy, and accordingly they refused to sign the contract, and the transaction was never consummated.

Subsequently Mr. Gordon requested Breytspraak to return the \$1000.00. Numerous requests and demands were made upon him, and finally on October 12, 1939 Gordon addressed a letter to Dr. Eddy, from which we quote as follows: "Since we abandoned the vitamin idea, I have asked Mr. Breytspraak to return the \$1,000 advanced to you and him on this deal. * * * I cannot help feel that a word from you will speed this matter along. I will appreciate it, therefore, if you will get in touch with Breytspraak and do all that you can for me."

Breytspraak had resided at Crystal Lake, McHenry County, for about five years before this suit was filed, and he argues at the outset that under section 7 of the Civil Practice Act (Ill. Rev. Stat. 1945, ch. 110), which provides that "* * * every civil action shall be commenced in the county where one or more defendants reside or in which the transaction or some part thereof occurred out of which the cause of action arose * * *," the suit should have been instituted in McHenry County, because, as his counsel argues, most of the transactions occurred elsewhere than in Cook County, within the contemplation of the statute. However, in defendant's original answer and counterclaim, which was subsequently amended, he admitted that the transaction out of which the cause of action arose, occurred in Cook County, Illinois. He appeared generally, and filed his answer and counterclaim without objecting to the jurisdiction of the court. It was not until he filed his second amended

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answer that the question of jurisdiction was raised, and under the provisions of section 11 of the Civil Practice Act and the settled rule of law in this state, the statute conferring upon the defendant the right to object to the jurisdiction of the court because suit was not brought in the proper county, confers a privilege of which a defendant may avail himself if he chooses, but if he does not plead this privilege in apt time, he will be regarded to have waived it and submitted to the jurisdiction of the court. Iles v. Heidenreich, 271 Ill. 480; May v. Chas. O. Larson Co., 304 Ill. App. 137. These authorities hold that it becomes the duty of a party to plead to the jurisdiction of the court at the earliest moment, and that he may not under a general appearance plead to the merits of the action and thereafter raise the question for the first time.

Upon the merits of the case we are satisfied from a careful examination of the record that the contract drawn by the Gordons was not in accordance with the oral agreement of the parties in New York in that it made the royalties payable out of net profits instead of providing for payment out of each and every gross sale. Both Dr. Eddy and Breytspraak testified that their oral agreement contemplated that the written contract should provide for their royalties out of the gross sales, and it seems entirely reasonable to accept their version of the conversation because it is not seriously disputed, and also because they were selling a formula prepared and to be supervised by a recognized authority, together with a merchandising and an advertising plan from which they were warranted in expecting a certain return in the way of royalties. Under plaintiffs' interpretation of the oral agreement there might not have been any net profits, and there is nothing in the record which would reasonably indicate

answer that the question of jurisdiction was raised, and under the provisions of section 11 of the Civil Practice Act and the settled rule of law in this state, the statute conferring upon the defendant the right to object to the jurisdiction of the court because it was not brought in the proper county, confers a privilege of which a defendant may avail himself if he chooses, but if he does not plead this privilege in apt time, he will be regarded to have waived it and submitted to the jurisdiction of the court.

Liss v. Heidenreich, 271 N.Y. 480; May v. Chase, O. Larson Co., 304 N.Y. App. 137. Those authorities hold that it becomes the duty of a party to plead to the jurisdiction of the court at the earliest moment, and that he may not under a general appearance plead to the merits of the action and thereafter raise the question for the first time.

Upon the merits of the case we are satisfied from a careful examination of the record that the contract drawn by the Gordons was not in accordance with the oral agreement of the parties in New York in that it made the royalties payable out of net profits instead of providing for payment out of each and every gross sale. Both Dr. Rddy and Graybarak testified that their oral agreement contemplated that the written contract should provide for their royalties out of the gross sales, and it seems entirely reasonable to accept their version of the contract because it is not seriously disputed, and also because they were selling a formula prepared and to be supervised by a recognized authority, together with a merchandising and an advertising plan from which they were warranted in expecting a certain return in the way of royalties. Under plaintiffs' interpretation of the oral agreement there might not have been any net profits, and there is nothing in the record which would reasonably indicate

that Dr. Eddy and Breyspraak were willing to indulge in such speculation. This conclusion is supported not only by the testimony of both Dr. Eddy and Breyspraak but by the fact that as soon as the written agreement was received, Dr. Eddy immediately notified the Gordons of the material changes and pointed out to them that there were some other discrepancies which he would be willing to waive provided the provision with respect to gross-sale royalties was corrected. The Gordons declined to do anything for several months, and then admittedly abandoned the idea because they felt the market was overcrowded with vitamin products and they had their doubts of the success of "Vitalert."

The remaining and important question is whether the \$1000.00 paid to Breyspraak was intended as compensation for the personal efforts he was requested to make by the Gordons in canvassing manufacturers and in determining the availability of ingredients to be used in the manufacture of "Vitalert." He rendered these services at the Gordons' request and expended considerable time and effort in canvassing chain-cigar stores in New York, Philadelphia, Boston and Chicago, as well as the leading men's clothing and apparel stores where the product was to be sold. The ascertainment of this information and the making of these contacts was at that time extremely important to the Gordons, because if the product was to be successfully marketed, definite outlets for the sale thereof had to be assured, and it seems reasonable to suppose that when they asked him to render these services they were willing to pay him for his time and effort. We have already quoted Dr. Eddy's testimony as to this phase of the transaction. He states explicitly that the Gordons wanted Breyspraak to continue the canvass

that Dr. Eddy and Greytak were willing to indulge in such speculation. This conclusion is supported not only by the testimony of both Dr. Eddy and Greytak but by the fact that as soon as the written agreement was received, Dr. Eddy immediately notified the Gordons of the material changes and pointed out to them that there were some other discrepancies which he would be willing to waive provided the provision with respect to gross-sale royalties was corrected. The Gordons declined to do anything for several months, and then admittedly abandoned the idea because they felt the market was overpowered with vitamin products and they had their doubts of the success of "Vitalart".

The remaining and important question is whether the \$1000.00 paid to Greytak was intended as compensation for the personal efforts he was requested to make by the Gordons in canvassing manufacturers and in determining the availability of ingredients to be used in the manufacture of "Vitalart". He rendered these services at the Gordons' request and expended considerable time and effort in canvassing chain-cigar stores in New York, Philadelphia, Boston and Chicago, as well as the leading men's clothing and apparel stores where the product was to be sold. The ascertainment of this information and the making of these contacts was at that time extremely important to the Gordons, because if the product was to be successfully marketed, definite outlets for the sale thereof had to be ascertained, and it seems reasonable to suppose that when they asked him to render these services they were willing to pay him for his time and effort. We have already quoted Dr. Eddy's testimony as to this phase of the transaction. It states explicitly that the Gordons asked Greytak to confine the canvass

of possible outlets, which Breyspraak agreed to do, providing the Gordons would, on their return to Chicago, make an advance payment of \$1000.00 to cover such services. That this was Dr. Eddy's understanding of this transaction is borne out by the fact that he indorsed the check which was made out jointly to him and Breyspraak, and turned over his share of the proceeds to Breyspraak because, as he thought and stated, Breyspraak was entitled to it. If the \$1000.00 check had been paid either on account of the first \$5000.00 in royalties or as a consideration for the signing of the contract by Breyspraak and Dr. Eddy, as the Gordons contend, Dr. Eddy would have been entitled to one-half of the proceeds thereof, and he was undoubtedly fully aware of that fact. The only circumstance that could cast any doubt upon this phase of the transaction is the first Gordon letter, dated March 24, 1939, in which the check was transmitted. This letter contains the self-serving statement that "I was willing to send you the check tonight without the contract even being drawn, because you said you needed the check so badly and that I could take your word for it * * *." The version of the \$1000.00 transaction given by Breyspraak and Eddy is much more probable, and there is ample evidence to support it.

It is entirely conjectural, of course, to speculate on whether the controversy as to the \$1000.00 check would have arisen if the transaction had been consummated and successfully carried out, but as we read the record the Gordons were solely responsible for the failure of the transaction, because they had their attorney draw a contract, the vital portion of which relating to royalties, changed entirely the method by which Eddy and Breyspraak were to be compensated for their formula, services and idea,

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this was Dr. Hddy's understanding of this transaction is borne out by the fact that he indorsed the check which was made out jointly to him and Greytak, and turned over his share of the proceeds to Greytak because, as he thought and stated, Greytak was entitled to it. If the \$1000.00 check had been paid either on account of the first \$500.00

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it.

It is entirely conjectural, of course, to speculate on whether the controversy as to the \$1000.00 check would have arisen if the transaction had been consummated and successfully carried out, but as we read the record the Gordons were solely responsible for the failure of the transaction, because they had their attorney draw a contract, the vital portion of which relating to royalties, changed entirely the method by which Hddy and Greytak were to be compensated for their formula, services and ideas,

and then for several months refused to do anything about the matter until they ultimately decided to abandon the project for the reasons already stated, and it seems to us that their demand for the return of the \$1000.00 was an afterthought resulting from the failure of the enterprise through their fault and indicated a total disregard of the time and effort expended by Breytspraak in trying to insure the success of the plan in compliance with their wishes and request.

It would serve no useful purpose to remand the cause for further hearing, because presumably all the oral and documentary evidence available was introduced upon the trial. Therefore the judgment of the Circuit court is reversed and judgment entered here in favor of defendant and against plaintiffs for costs.

JUDGMENT REVERSED AND JUDGMENT
HERE IN FAVOR OF DEFENDANT.

Seahlan and Sullivan, JJ., concur.

and then for several months refused to do anything about the matter until they finally decided to abandon the project for the reasons already stated, and it seems to us that their demand for the return of the \$1000.00 was an afterthought resulting from the failure of the enterprise through their fault and indicated a total disregard of the time and effort expended by Greyhound in trying to insure the success of the plan in compliance with their wishes and request.

It would serve no useful purpose to remand the case for further hearing, because presumably all the oral and documentary evidence available was introduced upon the trial. Therefore the judgment of the Circuit court is reversed and judgment entered here in favor of defendant and against plaintiffs for costs.

JUDGMENT REVERSED AND JUDGMENT
HERE IN FAVOR OF DEFENDANT.

Seaman and Sullivan, JJ., concur.

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43417

EDWARD S. GILLESPIE,
Plaintiff-Appellee,

v.

EVIE GILLESPIE, Incompetent,
Defendant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

On Appeal of HINDA SAMUELS,
Guardian ad Litem,
Appellant.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On August 27, 1943 Edward S. Gillespie filed a complaint for divorce against the defendant Evie Gillespie, charging desertion without any reasonable cause for the space of one year and upwards. A suggestion of insanity having been filed by her father and next friend, Hinda Samuels, defendant's aunt, was appointed guardian ad litem and William H. Temple was designated as her attorney. Subsequently, on June 28, 1944, plaintiff filed an amended complaint to annul his marriage to defendant, charging that on December 29, 1927, the day of the purported marriage, defendant was an insane person and incapable of entering into a valid marriage contract. Trial of the issues before the chancellor without a jury resulted in the entry of a decree formulated in harmony with the prayer of the amended complaint, from which the guardian ad litem has taken an appeal.

When the parties were married in Chicago on December 29, 1927, defendant was approximately 21 years of age. She had attended Wilberforce University in Ohio from 1918 to 1921, having gone there from her home in Vicksburg, Mississippi. After leaving Wilberforce University she came to Chicago, attended Bryant & Stratton business college, where she studied shorthand and typewriting, and subsequently, prior

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43417

EDWARD S. GILLISPIE,
Plaintiff-Appellee,

v.

EVIE GILLISPIE, Incompetent,
Defendant.

On appeal of WINDA S. S. S.
Guardian ad litem,

Appellant.

ATTORNEY AT LAW
JAMES M. COOK COUNTY.

RE, PRECEDING JUDICIAL FINDING DELIVERED THE OPINION OF THE COURT.

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Gammels, defendant's aunt, was appointed guardian ad litem

and William H. Temple was designated as her attorney. Sub-

sequently, on June 28, 1944, plaintiff filed an amended

complaint to annul his marriage to defendant, alleging that

on December 22, 1927, the day of the purported marriage,

defendant was an insane person and incapable of entering into

a valid marriage contract. Trial of the issues before the

chancellor without a jury resulted in the entry of a decree

formulated in harmony with the prayer of the amended complaint,

from which the guardian ad litem has taken an appeal.

When the parties were married in Chicago on December

22, 1927, defendant was approximately 21 years of age. She

had attended Wilberforce University in Ohio from 1918 to 1921,

having gone there from her home in Vicksburg, Mississippi.

After leaving Wilberforce University she came to Chicago,

attended Bryant & Stratton business college, where she

studied shorthand and typewriting, and subsequently, prior

to her marriage, was engaged in secretarial work for Carson Pirie Scott & Co. and Sears Roebuck & Co. After her marriage she was employed for a short time at the Lincoln State Bank in Chicago.

Early in 1929 she returned to Vicksburg and in March of that year she was taken by her father, Arthur J. Eilbatt, and her husband, Edward S. Gillespie, from Vicksburg to New Orleans, Louisiana for examination by a mental expert. Thereafter she remained in Vicksburg with her parents until August 1929, at which time plaintiff went to Vicksburg to get her, and drove her back to Chicago with Hinda Samuels and her husband. Following defendant's return to Chicago, she was treated at an institution in Hinsdale, Illinois for a mental condition, and within a year thereafter, on May 28, 1930, she was adjudicated insane by the County court of Cook County. Her disease was designated as dementia praecox, she was committed to the Kankakee State Hospital for the Insane, and remained there from May 28, 1930 until February 25, 1931, at which time she was transferred to the Manteno State Hospital at Manteno, Illinois. Following a 90-day parole, she was discharged as improved on July 18, 1931, but has never been restored to sanity by any order of court, and admittedly is now and has been since May 28, 1930 an insane person. After a painstaking trial, during which some ten witnesses testified on behalf of plaintiff and six others on behalf of defendant, the chancellor found that defendant was an insane person on the date of her marriage, December 29, 1927, and at that time did not have the mental capacity to enter into a valid marriage.

The principal ground urged for reversal is that the decree is contrary to the manifest weight of the evidence. The question of fact involved is whether defendant had

to her marriage, was engaged in secretarial work for Carson
Pillsbury & Co. and Sears Roebuck & Co. After her marriage
she was employed for a short time at the Lincoln State
Bank in Chicago.

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of that year she was taken by her father, Arthur J. Willett,
and her husband, Edward S. Gillespie, from Vicksburg to New
Orleans, Louisiana for examination by a mental expert. There-
after she remained in Vicksburg with her parents until August
1929, at which time plaintiff went to Vicksburg to get her,
and drove her back to Chicago with Linda Samuels and her
husband. Following defendant's return to Chicago, she was
treated at an institution in Winnebago, Illinois for a mental
condition, and within a year thereafter, on May 28, 1930,
she was adjudicated insane by the County court of Cook County.
Her disease was designated as dementia praecox, she was
committed to the Kanebo State Hospital for the Insane, and
remained there from May 28, 1930 until February 22, 1931, at
which time she was transferred to the Montrose State Hospital
at Montrose, Illinois. Following a 90-day parole, she was
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a valid marriage.

The principal ground urged for reversal is that the
decree is contrary to the manifest weight of the evidence.

The question of fact involved is whether defendant had

sufficient mental capacity on the day of her marriage to enter into a valid marriage contract. Without reviewing in detail the testimony of the numerous witnesses embraced within a record of almost 400 pages, the substance of their testimony and the essential matters with respect to which they testified, may be summarized as follows: B. M. Santos, a physician, but not a psychiatrist, called on behalf of plaintiff, testified that he had examined defendant in 1929 or 1930, found her insane and that he signed the necessary papers for her commitment to the Kankakee State Hospital. His finding as to insanity was based upon one examination and casual social contacts had with defendant over a six or eight-month period some two years after her marriage, during which he noticed that she acted reticent and uncooperative.

Several lay witnesses, including W. Ellis Stewart, Anna Pitman, Inez M. Dickerson and Edreaner Gillespie, who either resided in the same building as defendant, or had been her friends prior to the marriage, or had known her during her childhood, or lived in the immediate neighborhood where she resided, and had frequent opportunity to observe her and converse with her, gave it as their opinion that she was insane on December 29, 1927. Their conclusions were predicated upon observations of and conversations with defendant during her engagement and after her marriage, and some of the observations antedated both events, and the opinions of the witnesses generally dealt with her peculiarly moody manner, reticence, distraction when engaged in conversation, imaginary ailments, her apparently dazed condition, and general demeanor.

Inez M. Dickerson, who in 1927 lived next door to the Gillespies, testified that before the marriage she had noticed that defendant had a peculiar look in her eyes, that

sufficient mental capacity on the day of her marriage to enter into a valid marriage contract. Without revealing in

detail the testimony of the numerous witnesses embraced within a record of almost 400 pages, the substance of their testimony and the essential matters with respect to which they testified, may be summarized as follows: D. M. Santos,

a physician, but not a psychiatrist, called on behalf of plaintiff, testified that he had examined defendant in 1929 or 1930, found her insane and that he signed the necessary papers for her commitment to the Kansas State Hospital.

His finding as to insanity was based upon one examination and casual social contacts had with defendant over a six or eight-month period some two years after her marriage, during which he noticed that she acted reticent and uncooperative. Several lay witnesses, including W. Willis Stewart,

Anna Pittman, Inez M. Dickerson and Katherine Gillespie, who either resided in the same building as defendant, or had been her friends prior to the marriage, or had known her during her childhood, or lived in the immediate neighborhood where she resided, and had frequent opportunity to observe her and converse with her, gave it as their opinion that she was insane on December 29, 1927. Their conclusions were predicated upon observations of and conversations with defendant during her engagement and after her marriage, and some of the observations antedated both events, and the opinions of the witnesses generally as to her peculiarly moody manner, reticence, distraction when engaged in conversation, imaginatively ailments, her apparently dazed condition, and

general demeanor.

Inez M. Dickerson, who in 1927 lived next door to the Gillespies, testified that before the marriage she had noticed that defendant had a peculiar look in her eyes, that

they shifted, and that in conversation she could not stay on one subject.

Edme^{er} Gillespie, plaintiff's mother, testified that she first met defendant in 1927, several months before her marriage, and saw her frequently thereafter at gatherings and at the witness' home; that she frequently had conversations with her and discussed the impending marriage; that she was present at the ceremony and talked to her on that day; that plaintiff and defendant stayed at her home the night of the wedding and lived there for some time thereafter; that defendant appeared to be very moody and "always imagined there was something wrong with her, * * * she thought she had different ailments. In conversations she seemed in a daze. I asked her would she understand me, she would say yes. We would just let it drop. I would notice she didn't seem to grasp what I was talking about. * * * The night of the marriage I had quite a time trying to persuade her to go to her husband. She gave no reason. She said she did not want to. I tried to make her understand her obligations of marriage. She didn't seem to understand that. I had quite a time after the marriage. She began to talk about these ailments again and that she was going to leave him. I begged and pleaded with her here. She said, 'I don't know, I don't want to be married to him or any other man.' After that she would tell me she was going to kill him and kill herself. This was a week after the marriage. * * * She seemed moody and worried. I asked her what was wrong. I did not tell my son his wife talked about killing. It impressed me, I didn't speak to my son, I was afraid of what I saw. I tried to keep it for a period of months. When I did, he went to pieces. He told me he saw it, and was hoping against hope what he saw wasn't true."

they started, and that in conversation she could not stay on one subject.

Witness William E. Blaisdell, Plaintiff's mother, testified that the first met defendant in 1927, several months before her marriage, and saw her frequently thereafter at gatherings and at the witness' home; that she frequently had conversations with her and discussed the impending marriage; that she was present at the ceremony and talked to her on that day; that Blaisdell and defendant stayed at her home the night of the wedding and lived there for some time thereafter; that defendant appeared to be very moody and "always imagined there was something wrong with her," * * * she brought the and different ailments. In conversations she seemed in a daze. I asked her would she understand me, she would say yes. We would just let it drop. I would notice she didn't seem to grasp what I was talking about. * * * The night of the marriage I had quite a time trying to persuade her to go to her husband. She gave no reason. She said she did not want to. I tried to make her understand her obligations of marriage. She didn't seem to understand that. I had quite a time after the marriage. She began to talk about these ailments again and that she was going to leave him. I begged and pleaded with her here. She said, 'I don't know, I don't want to be married to him or any other man.' After that she would tell me she was going to kill him and kill herself. This was a week after the marriage. * * * She seemed moody and worried. I asked her what was wrong. It did not tell my son his wife talked about killing. I impressed me, I didn't speak to my son, I was afraid of what I saw. I tried to keep it for a period of months. When I did, he went to pieces. He told me he saw it, and was hoping against hope what he saw wasn't true."

W. Ellis Stewart, secretary of the Supreme Liberty Life Insurance Company, testified that for about three years preceding the marriage he lived in the same apartment building as Gillespie; that he had known defendant for several months before the marriage and saw her at least once or twice a week prior to December 29, 1927; that he occasionally had conversations with her, once at his office about two or three months before the marriage; that on one of these occasions he congratulated her upon coming into the Gillespie family, and that "she practically said nothing, just turned away without comment, not as if she did not understand it, but as if she ignored it." Testifying further, the witness said: "My opinion [that she was insane] is based upon the [above] conversation I had with her the two or three days before the wedding. Her action was not the action of a normal person. * * * I arrived at the opinion she was insane after the marriage from the things that happened after her marriage. She did many acts of an insane person. I traced it back to this incident that occurred before."

Anna Pitman knew defendant in Vicksburg, Mississippi before she came to Chicago, lived several blocks from her home and saw her frequently when she was a child. Later, in 1927 and subsequently, she saw her in Chicago about once a week. She stated that as a child defendant seemed indifferent and held herself aloof from others, and that she later observed the same characteristics when she met defendant in Chicago.

William J. Johnson worked at the Lincoln State Bank, first as a messenger, then as a teller, and met defendant when she came to work there in the early part of 1929. He testified that after three or four days she said: "Mr.

W. Ellis Stewart, secretary of the Supreme Liberty

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Anna Pittman, now defendant in Vickburg, Mississippi

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William J. Johnson, owner of the Lincoln State Bank,

first as a messenger, then as a teller, and met defendant

when she came to work there in the early part of 1929. He

testified that after three or four days she said: "Mr.

Johnson, I am going to leave here." Upon asking her what the trouble was, she responded: "People coming in the bank, they look at me so strange, I am afraid. I imagine somebody is always chasing me." He attempted to reassure her by telling her that "you musn't feel like that. This is a public place, as long as they don't say anything to you, everything will be all right," but the witness added: "She continued to have that strange idea. I think the next day, I took her home in my car" and she never returned to the bank.

Maud Samuel, called as a witness on behalf of defendant, gave it as her opinion that defendant was sane on the day of her marriage. She had met her several years prior thereto, and had conversations with her at various times. The witness made defendant's wedding dress, talked to her while she was being fitted, and considered her a sane person, and said that at a luncheon given in June 1928 by the witness, at which defendant was a guest, she seemed very happy, responded readily to questions, and acted rational. On cross-examination, the witness testified that defendant told her she hoped that news of her marriage would not appear in the papers here, but did not give any reason therefor.

June Howe testified that defendant was her best friend, that she first met her in 1922 in Chicago, and thereafter, up to the time of the marriage, she attended dances, football games, luncheons and the theater with defendant; that defendant's conversations with her were natural and normal, and she believed defendant to be sane. On cross-examination, Mrs. Howe stated that defendant expressed a natural apprehension about her light complexion, and that she had been regarded as a white person by her

Johnson, I am going to leave here." Upon asking her what the trouble was, she responded: "People coming in the bank, they look at me so strange, I am afraid. I imagine somebody is always staring me." He attempted to reassure her by telling her that "you mean't feel like that. This is a public place, as long as they don't say anything to you, everything will be all right," but the witness added: "She continued to have that strange idea. I think the next day, I took her home in my car" and she never returned to the bank.

Mrs. Samuel, called as a witness on behalf of defendant, gave it as her opinion that defendant was sane on the day of her marriage. She had met her several years prior thereto, and had conversations with her at various times. The witness made defendant's wedding dress, talked to her while she was being fitted, and considered her a sane person, and said that at a luncheon given in June 1928 by the witness, at which defendant was a guest, she seemed very happy, responded readily to questions, and acted normally. On cross-examination, the witness testified that defendant told her she hoped that news of her marriage would not appear in the papers here, but did not give any reason therefor.

June More testified that defendant was her best friend, that she first met her in 1922 in Chicago, and thereafter, up to the time of the marriage, she attended dances, football games, luncheons and the theater with defendant; that defendant's conversations with her were natural and normal, and she believed defendant to be sane. On cross-examination, she now stated that defendant expressed a natural apprehension about her light complexion, and that she had been regarded as a white person by her

employers and business associates. Mrs. Howe felt that "it was a normal thing for her not to want to be seen in the loop with persons of dark complexion, for fear someone would go to the place where they knew her."

Martha Gant knew defendant as a child in Vicksburg, Mississippi, and then attended Wilberforce University when defendant was a student there. Later she saw her frequently in Chicago. Based upon these associations, her opinion was that defendant was not insane. She knew that defendant passed for a white person at her work downtown, but testified that defendant had never indicated any apprehension about being followed.

Hinda Samuels, defendant's aunt and guardian ad litem, testified that defendant lived with her from 1922 until she was married, except when she visited her parents in Vicksburg; that while living with her defendant assisted with the housework, attended Bryant & Stratton business college, and later was employed at Carson Pirie Scott & Co. and Sears Roebuck & Co.; that she was present at the wedding ceremony, and that defendant responded to the questions propounded by the minister; that before the wedding she told the witness that she loved Edward and thought he would make a good husband. In 1929 the witness drove to Vicksburg in her husband's car, together with plaintiff, defendant, and the witness' daughter. While they were in Vicksburg, the Hilblatts had a reception for plaintiff. She was of the opinion that defendant was sane on December 29, 1927. On cross-examination, Mrs. Samuels stated that defendant lost her mind sometime before she went to Hinsdale Sanatorium, and at that time she had apprehensions about being pursued, and recalled some conversation with her about being followed while she worked at the Lincoln State Bank.

employers and business associates. Mrs. Howe felt that it was a normal thing for her not to want to be seen in the loop with persons of such complexion, or fear someone would go to the place where they knew her.

Martin Gant knew defendant as a child in Wisconsin, Massachusetts, and then attended Milborne University when defendant was a student there. Later she saw her frequently in Chicago. Based upon these associations, her opinion was that defendant was not insane. She knew that defendant passed for a white person at her work downtown, but testified that defendant had never indicated any apprehension about being followed.

Linda Gamble, defendant's aunt and guardian ad litem, testified that defendant lived with her from 1922 until she was married, except when she visited her parents in Wisconsin; that while living with her defendant assisted with the housework, attended Bryant & Stratton business college, and later was employed at Carson Little Scott & Co. and Sears Roebuck & Co.; that she was present at the wedding ceremony, and that defendant responded to the questions propounded by the minister; that before the wedding she told the witness that she loved Edward and thought he would make a good husband. In 1929 the witness drove to Wisconsin in her husband's car, together with plaintiff, defendant, and the witness' daughter. While they were in Wisconsin, the Tibbitts had a reception for plaintiff. She was of the opinion that defendant was sane on December 29, 1927. On cross-examination, Mrs. Gamble stated that defendant lost her mind sometime before she went to Hinsdale Sanatorium, and at that time she had apprehensions about being pursued, and recalled some conversation with her about being followed while she worked at the Lincoln State Bank.

Most of defendant's witnesses adduced evidence on cross-examination that defendant concealed her racial identity, that she passed as a white person among her business associates, and one of them testified she was concerned lest her employers should discover the fact that she was a colored person.

In addition to the lay witnesses, plaintiff adduced the testimony of two eminent psychiatrists, Drs. Alex S. Hirschfield and Harry R. Hoffman, neither of whom had examined defendant but predicated their opinions upon hypothetical questions. Both doctors were present in the court room when the evidence of many of the witnesses was being adduced, and their answers were based not only upon the testimony which they heard but upon the hypothetical questions propounded. One of the errors assigned by defendant is that the chancellor allowed plaintiff to testify, notwithstanding his incompetency under section 2, chapter 51, Ill. Rev. Stat. 1945. In support of this contention it is argued that the testimony of the two psychiatrists must be excluded because the hypothetical questions put to them were based in part upon the incompetent testimony of plaintiff. Although it is true that the hypothetical questions put to these witnesses assumed some of the facts testified to by plaintiff, nevertheless, before the conclusion of the trial, all matters and things therein contained were adduced in evidence by witnesses other than the plaintiff. We have examined the hypothetical questions propounded to the psychiatrists, and find them in all respects proper and predicated upon competent evidence embraced within the record. Both psychiatrists testified that dementia praecox was a slow insidious form of insanity that starts early in life, usually in the teens or adolescent stage of an individual's

Most of defendant's witnesses advanced evidence on

cross-examination that defendant concealed her mental identity, that she passed as a white person among her business associates, and one of them testified she was concerned lest her employers should discover the fact that she was a colored person.

In addition to the lay witnesses, plaintiff introduced the testimony of two eminent psychiatrists, Drs. Alex E. Hirschfeld and Harry H. Hoffman, neither of whom had examined defendant but testified their opinions upon hypothetical questions. Both doctors were present in the court room when the evidence of many of the witnesses was being adduced, and their answers were based not only upon the testimony which they heard but upon the hypothetical questions propounded. One of the errors assigned by defendant is that the chancellor allowed plaintiff to testify, notwithstanding his incompetency under section 2, chapter 11, Ill. Rev. Stat. 1945. In support of this contention it is argued that the testimony of the two psychiatrists must be excluded because the hypothetical questions put to them were based in part upon the incompetent testimony of plaintiff. Although it is true that the hypothetical questions put to these witnesses assumed some of the facts testified to by plaintiff, nevertheless, before the conclusion of the trial all matters and things therein contained were adduced in evidence by witnesses other than the plaintiff. We have examined the hypothetical questions propounded to the psychiatrists, and find them in all respects proper and directed upon competent evidence embraced within the record. Both psychiatrists testified that dementia praecox was a slow insidious form of insanity that starts early in life, usually in the late or adolescent stage of an individual's

life, that it is of unknown origin, and may go on for years before it develops into symptoms that a layman could recognize.

These observations lead to the statement of the well-known rule of law in this and other states that where a case is tried by the chancellor, his decision will not be reversed unless it is clearly and manifestly against the weight of the evidence. Elder v. Clarke, 385 Ill. 335; Elsasser v. Miller, 383 Ill. 243; West v. LePage, 381 Ill. 131; Sroczynski v. Schultz, 381 Ill. 86; Cravens v. Hubble, 375 Ill. 51; and Van Amburg v. Reynolds, 372 Ill. 317. The rule is also well established that where the evidence is conflicting, the chancellor will not be reversed unless his findings are clearly and manifestly against the weight of the evidence. Brozina v. Wanda, 387 Ill. 46; Jones v. Dove, 382 Ill. 445.

Although it appears that the chancellor permitted plaintiff to testify, the record discloses that he was fully aware of the plaintiff's incompetency as a witness, as indicated by the chancellor's statements of record, and he undoubtedly recognized that there was sufficient competent evidence besides the testimony of Edward S. Gillespie, the plaintiff, tending to show that at and before the marriage defendant was insane, because he so stated fully in the course of his rulings on defendant's motion to dismiss at the close of plaintiff's case.

At the conclusion of the trial the chancellor reviewed some of the evidence, and gave his reasons for finding that defendant was an insane person on December 29, 1927 and did not then have the mental capacity to enter into a valid marriage. He stated that among other things he was impressed by the testimony of the lay witnesses who appeared in behalf

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unless it is clearly and manifestly against the weight of

the evidence. Widger v. Clarke, 385 Ill. 332; Wassenaar v.

Miller, 383 Ill. 243; East v. LePage, 381 Ill. 131;

Procymski v. Schmitz, 381 Ill. 86; Graves v. Imhoff, 375

Ill. 71; and Van Amburgh v. Reynolds, 372 Ill. 317. The rule

is also well established that where the evidence is com-

flitting, the chancellor will not be reversed unless his

findings are clearly and manifestly against the weight of

the evidence. Bozinger v. Land, 387 Ill. 46; Jones v.

Dove, 382 Ill. 442.

Although it appears that the chancellor permitted

plaintiff to testify, the record discloses that he was fully

aware of the plaintiff's incompetency as a witness, as in-

dicated by the chancellor's statements of record, and he

undoubtedly recognized that there was sufficient competent

evidence besides the testimony of Edward S. Gillespie, the

plaintiff, tending to show that at and before the marriage

defendant was insane, because he so stated fully in the

course of his rulings on defendant's motion to dismiss at

the close of plaintiff's case.

At the conclusion of the trial the chancellor reviewed

some of the evidence, and gave his reasons for finding that

defendant was an insane person on December 29, 1927 and did

not then have the mental capacity to enter into a valid

marriage. He stated that among other things he was impressed

by the testimony of the lay witnesses who appeared in behalf

of defendant, but pointed out certain objective facts in the case such as defendant's treatment in Hinsdale Sanatorium within some twenty months after her marriage, her adjudication of insanity by the County court of Cook County, and the admitted fact that she was at the time of the trial insane. He stated that he had "weighed and considered the evidence in this case very carefully during the days that it has been under my consideration; and while there is much to be said in support of the contention so ably presented by defendant's counsel in behalf of the weight to be given to the testimony of the lay witnesses appearing for the defendant, * * * that she was of [sound] mental capacity and was capable of entering into the marriage relationship on December 29, 1927, [nevertheless] the court has arrived at the conclusion, considering all the facts and circumstances in evidence, considering * * * the nature of the mental disease known as dementia praecox, that it seems inescapable from the evidence in this case that the defendant was suffering from dementia praecox at and before the time in question, viz., December 29, 1927."

From a careful examination of the record, the conclusion is fully warranted that defendant was insane long prior to the date of her adjudication and commitment in May 1930. The only question that can fairly be said to exist is, how long that condition had existed. According to the testimony of the psychiatrists, dementia praecox usually begins during adolescence and progresses with the years. The fears and apprehensions of defendant, as testified to by some of plaintiff's lay witnesses, fortify the conclusion that her insanity may have been in its incipient stages long before her marriage, and that on the date of her marriage she did not have the mental

of defendant, but pointed out certain objective facts in the case such as defendant's treatment in Hinckley Sanatorium within some twenty months after her marriage, her adjudication of insanity by the County Court of Cook County, and the admitted fact that she was at the time of the trial insane.

We stated that we had "weighed and considered the evidence in this case very carefully during the days that it has been under my consideration; and while there is much to be said in

support of the contention so ably presented by defendant's counsel in behalf of the weight to be given to the testimony of the lay witnesses appearing for the defendant, * * * that she was of [sound] mental capacity and was capable of entering into the marriage relationship on December 29, 1927,

[nevertheless] the court has arrived at the conclusion, considering all the facts and circumstances in evidence, con-

sidering * * * the nature of the mental disease known as dementia praecox, that it seems inescapable from the evidence in this case that the defendant was suffering from dementia praecox at and before the time in question, viz., December 29, 1927."

From a careful examination of the record, the commission is fully warranted that defendant was insane long prior to the date of her adjudication and commitment in May 1930. The only question that can fairly be said to exist is, how long that condition had existed. According to the testimony of the psychiatrists, dementia praecox usually begins during adolescence and progresses with the years. The facts and appearances of defendant, as testified to by some of plaintiff's lay witnesses, fortify the conclusion that her insanity may have been in its incipient stages long before her marriage, and that on the date of her marriage she did not have the mental

capacity to enter into a valid marriage contract. /

For the reasons indicated, we are impelled to conclude that the findings of the chancellor who saw and heard the witnesses and gave the hearing of the case the most careful and serious consideration, are not contrary to the manifest weight of the evidence and ought not to be disturbed. Therefore, the decree of the Superior court is affirmed.

DECREE AFFIRMED.

Scanlan and Sullivan, JJ., concur.

capacity to enter into a valid marriage contract.
For the reasons indicated, we are impelled to con-
clude that the findings of the chancellor who saw and
heard the witnesses and gave the hearing of the case the
most careful and serious consideration, are not contrary
to the manifest weight of the evidence and ought not to
be disturbed. Therefore, the decree of the Superior
Court is affirmed.

DECREES AFFIRMED.

Scoville and Sullivan, J., concur.

43431

LORETTA PABIS, Administratrix of
the Estate of WALTER DEMBSKI,
Deceased,

Appellant,

v.

THOMAS J. FRIEL and CHARLES C.
RENSHAW, as Trustees, etc., et al.,
doing business as CHICAGO SURFACE
LINES,

Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

328 I.A. 583

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Loretta Pabis, administratrix of the estate of Walter Dembski, deceased, brought suit against defendants to recover damages for injuries to the decedent resulting in his death, alleged to have been caused through the negligence of defendants' motorman while operating one of their streets cars at the intersection of North Ashland and Milwaukee avenues in Chicago. Trial by jury resulted in a verdict of not guilty, upon which the court entered judgment, and from which plaintiff appeals.

The facts disclose that Ashland avenue runs north and south, and Milwaukee avenue is a diagonal thoroughfare running northwest and southeast, thereby forming a triangular corner at the intersection of these two streets. There are two street-car tracks running parallel along Ashland avenue. On the northwest corner of Milwaukee and Ashland avenues is a building occupied by Continental Clothing Company, and on the northeast corner of the intersection, directly opposite the building occupied by Continental Clothing Company, is a four-story brick building known as 1229 Ashland avenue. Immediately adjacent to the southbound street-car track and near the northwest corner is a safety island or loading platform, used by persons boarding and alighting from

43431

LORETTA PABLO, Administratrix of
the Estate of WALTER DZIMBAK,
Deceased,

Appellant,

v.

THOMAS J. FRIEL and CHARLES G.
RIMBAW, as Trustees, etc., et al.,
doing business as CHICAGO CUNYAGE
LINES,

Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

3261 A. 383

MR. PRESIDING JUSTICE FRIEL DELIVERED THE OPINION OF THE COURT.

Loretta Pablo, administratrix of the estate of Walter
Dzimbak, deceased, brought suit against defendants to recover
damages for injuries to the decedent resulting in his death,
alleged to have been caused through the negligence of defend-
ants' motorcar while operating one of their street cars at
the intersection of North Ashland and Milwaukee avenues in
Chicago. Trial by jury resulted in a verdict of not guilty,
upon which the court entered judgment, and from which
plaintiff appeals.

The facts disclose that Ashland avenue runs north and
south, and Milwaukee avenue is a diagonal thoroughfare
running northeast and southeast, thereby forming a triangular
corner at the intersection of these two streets. There are
two street-car tracks running parallel along Ashland avenue.
On the northwest corner of Milwaukee and Ashland avenues is
a building occupied by Continental Clothing Company, and on
the northeast corner of the intersection, directly opposite
the building occupied by Continental Clothing Company, is a
four-story brick building known as 1229 Ashland avenue.
Immediately adjacent to the southward street-car track and
near the northwest corner is a safety island or loading
platform, used by persons boarding and alighting from

southbound cars. This safety island is about six or eight inches above the street level, 103 feet long and four feet six inches wide. The northerly crosswalk of Milwaukee avenue, if extended, would be south of and adjoining the southerly corner of the safety island. On the west sidewalk of Ashland avenue, near the curb and 37 feet south of the north end of the safety island, is an electrically operated "stop" and "go" traffic signal light. This light is 66 feet north of the south end of the island.

In mid-afternoon of May 26, 1943, plaintiff's intestate, then 56 or 58 years of age, in good health and in full possession of his mental faculties, was in the act of crossing Ashland avenue from the west to the east side of the street near the southerly end of the safety island, or at a point not more than ten or fifteen feet north of the south end of the island, being directly opposite the building on the northeast corner of the intersection, known as 1229 Ashland avenue. A street car approaching from the north had the red light, which required all north and southbound traffic to stop. Plaintiff contends, and adduced evidence to show, that it was customary for all cars to stop at least 30 feet north of the south end of the safety island, and it is contended that the street car proceeded south along almost the full length of the safety island beyond the regular signal light, and struck the deceased just after he had started moving in an easterly direction to cross Ashland avenue, causing injuries which resulted in his death almost immediately thereafter. Defendants made a motion for a directed verdict on the theory that the evidence justified the conclusion that decedent was not in the exercise of care for his own safety, and that his injuries resulted from his own negligence. They

southbound cars. This safety island is about six or eight inches above the street level, 103 feet long and four feet six inches wide. The northernly crosswalk of Milwaukee Avenue, if extended, would be south of and adjoining the southerly corner of the safety island. On the west sidewalk of Island Avenue, near the curb and 75 feet south of the north end of the safety island, is an electrically operated "stop" and "go" traffic signal light. This light is 66 feet north of the south end of the island.

In mid-afternoon of May 26, 1943, Plaintiff's interest, then 26 or 27 years of age, in good health and in full possession of his mental faculties, was in the act of crossing Island Avenue from the west to the east side of the street near the southerly end of the safety island, or at a point not more than ten or fifteen feet north of the south end of the island, being directly opposite the building on the northeast corner of the intersection, known as 1229 Island Avenue. A street car approaching from the north had the red light, which required all north and southbound traffic to stop. Plaintiff continued, and advised evidence to show, that it was customary for all cars to stop at least 20 feet north of the south end of the safety island, and it is contended that the street car proceeded south along about the full length of the safety island beyond the regular signal light, and struck the deceased just after he had started moving in an easterly direction to cross Island Avenue, causing injuries which resulted in his death almost immediately thereafter. Plaintiff made a motion for a directed verdict on the theory that the evidence justified the conclusion that defendant was not in the exercise of care for his own safety, and that his injuries resulted from his own negligence. They

say that the undisputed evidence shows that when the car was from two to five feet from him, decedent stepped from the island to the track in front of the moving car, that the motorman immediately applied full brakes, and the car was stopped right where it struck the decedent and did not run over him; that there was nothing to prevent him from seeing the car; and that under the authorities cited he was guilty as a matter of law of a failure to exercise due care for his own safety in making an attempt to cross even on the established crosswalk. Russell v. Richardson, 308 Ill. App. 11; Chicago Union Traction Co. v. Browdy, 206 Ill. 615; Soic v. Richardson, 315 Ill. App. 213 (Abst.); Richter v. Cummings, 321 Ill. App. 627 (Abst.); and other Illinois cases.

Matthew O'Connell, a police officer stationed at the intersection in question, testified that the stop light was north of the point where the decedent fell, indicating that the street car had passed beyond the traffic signal, and he stated that from time to time prior to the accident he had observed people walking across Ashland avenue at any point south of the traffic light; that he did not know how many people per day crossed in that manner, "but I know a lot of people cross the street that way." Another witness, Albert L. Hronek, a salesman for the Continental Clothing Company, which is located on the northwest corner of the intersection, testified that people crossing Ashland avenue from west to east at places south of the traffic signal "pass any place south of the traffic signal. * * * I see a great many of them from time to time crossing from the west side of Ashland avenue outside the white lines. That has been true for some period of time before the accident. That

say that the undisputed evidence shows that when the car was from two to five feet from him, decedent stopped from the island to the track in front of the moving car, that the motorist immediately applied full brakes, and the car was stopped right where it struck the decedent and did not run over him; that there was nothing to prevent him from

seeing the car; and that under the authorities cited he was guilty as a matter of law of a failure to exercise due care for his own safety in making an attempt to cross even

on the established crosswalk. Russell v. Richardson, 308

Ill. App. 11; Chicago Union Traction Co. v. Bready, 206 Ill.

62; Boie v. Richardson, 315 Ill. App. 213 (1st); Wright

v. Cummings, 321 Ill. App. 627 (1st); and other Illinois

cases.

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Albert L. Hronsek, a salesman for the Continental Clothing Company, which is located on the northwest corner of the intersection, testified that people crossing Ashland avenue from west to east at places south of the traffic signal

"pass any place south of the traffic signal. * * * I see a great many of them from time to time crossing from the west side of Ashland avenue outside the white lines. That has been true for some period of time before the accident. That

was their habit 6 or 7 months or longer before the accident."

It was competent for plaintiff to introduce, and for the court to receive, evidence of the custom, to which two or more of the witnesses testified, and the mere fact that plaintiff's intestate attempted to cross the track in front of the car which was only a few feet away but which had slowed down to almost a stop, would not of itself prove that he was guilty of contributory negligence, because he may have depended upon the custom and the traffic signal showing red, which required all north and southbound traffic to halt. Under the circumstances we think that it was a question of fact for the jury to determine whether deceased was in the exercise of due care for his own safety, and that the court would not have been justified in directing a verdict holding that he was negligent as a matter of law and that his administratrix was therefore precluded from recovering.

The case was allowed to go to the jury, which evidently reached the conclusion, under the instructions tendered by defendants and given by the court, that defendants were not guilty. Plaintiff contends that the verdict was produced by the repetitious use in seven of the seventeen instructions tendered by defendants of the phrases "the plaintiff cannot recover," "you should find the defendants not guilty," and other phrases of like import, thereby conveying to the jury the impression that the court was opposed to the plaintiff's theory of the case. We have examined the instructions, and find that they are subject to the criticism which the plaintiff makes. We had occasion, in Gulich v. Ewing, 318 Ill. App. 506, where the facts were sharply in conflict, to reverse the judgment and remand the cause for retrial for the sole reason that the instructions given were repetitious, prejudicial,

was their habit 6 or 7 months or longer before the accident."

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of the car which was only a few feet away but which had allowed down to almost a stop, would not of itself prove that he was guilty of contributory negligence, because he may have depended upon the custom and the traffic signal showing red, which required all north and southbound traffic to wait. Under the circumstances we think that it was a question of fact for the jury to determine whether deceased was in the exercise of due care for his own safety, and that the court would not have been justified in directing a verdict holding that he was negligent as a matter of law and that his administrative was therefore precluded from recovering.

The case was allowed to go to the jury, which evidently reached the conclusion, under the instructions tendered by defendants and given by the court, that defendants were not guilty. Plaintiff contends that the verdict was produced by the repetition in seven of the seventeen instructions of the language of the phrases "the plaintiff cannot recover," "you should find the defendants not guilty," and other phrases of like import, thereby conveying to the jury the impression that the court was opposed to the plaintiff's theory of the case. We have examined the instructions, and find that they are subject to the criticism which the plaintiff makes. We had occasion, in Smith v. Smith, 118 Ill. App. 506, where the facts were sharply in conflict, to reverse the judgment and award the cause for retrial for the sole reason that the instructions given were repetitious, prejudicial,

and therefore erroneous. In that case nine of the seventeen instructions tendered by defendant and given by the court, concluded with words of similar import, and after reviewing the decisions, in many of which the courts had repeatedly condemned the practice of needlessly concluding numerous instructions with phrases of the character indicated and had entered orders of reversal in a number of them on that ground alone, we pointed out that the vice of such a charge lies in the fact that it is calculated to impress the jury with the thought that the court was against the plaintiff on the question of fact, and the jury might easily be misled to believe that in the opinion of the court they should find for the defendant. In Nelson v. Chicago City Railway Co., 163 Ill. App. 98, the court criticized the practice by saying: "This is only another way of emphasizing the words 'not guilty' and is as effective, if not more so, as printing the words in large type - a practice condemned in Elwood v. Chicago City Ry., 90 Ill. App. 397." In Wood v. I. C. R. R. Co., 185 Ill. App. 180, six of the fifteen instructions offered by defendant and given, concluded with the charge that a verdict of "not guilty" should be returned. In these fifteen instructions certain principles of law favorable to the defendant were, by many frequent repetitions, unduly emphasized, and were held to have been brought too prominently to the attention of the jury. The court there reached the conclusion that the giving of these instructions required a reversal, and remanded the case for retrial. A similar situation existed in Cohen v. Weinstein, 231 Ill. App. 84; Daubach v. Drake Hotel Co., 243 Ill. App. 298; Williams v. Stearns, 256 Ill. App. 425; City of Lake Forest v. Janowitz, 295 Ill. App. 289; and Pillow v. Long, 299 Ill. App. 542. As stated in the Gulich case, such a practice is undoubtedly

and therefore erroneous. In that case nine of the seventeen instructions tendered by defendant and given by the court, concluded with words of similar import, and after reviewing the decisions, in many of which the courts had repeatedly condemned the practice of needlessly concluding numerous instructions with phrases of the character indicated and had entered orders of reversal in a number of them on that ground alone, we pointed out that the vice of such a charge lies in the fact that it is calculated to impress the jury with the thought that the court was against the plaintiff on the question of fact, and the jury might easily be misled to believe that in the opinion of the court they should find for the defendant. In Nelson v. Chicago City Railway Co., 163 Ill. App. 98, the court criticized the practice by saying: "This is only another way of emphasizing the words 'not guilty' and as an effective, if not more so, as pointing the words in large type - a practice condemned in Wood v. Chicago City Ry., 90 Ill. App. 397." In Wood v. I. G. R. Co., 185 Ill. App. 180, six of the fifteen instructions offered by defendant and given, concluded with the charge that a verdict of "not guilty" should be returned. In these fifteen instructions certain principles of law favorable to the defendant were, by many frequent repetitions, unduly emphasized, and were held to have been brought too prominently to the attention of the jury. The court there reached the conclusion that the giving of these instructions required a reversal, and remanded the case for retrial. A similar situation existed in Gohen v. Weinstein, 251 Ill. App. 64; Danbach v. Danbach, 243 Ill. App. 288; Williams v. Stearns, 256 Ill. App. 443; City of Lake Forest v. Lake Forest, 255 Ill. App. 289; and Ellow v. Lane, 259 Ill. App. 542. As stated in the Quitch case, such a practice is undoubtedly

misleading to the jury and prejudicial to plaintiff's cause, because to repeat constantly and needlessly the charge "then you should find the defendant not guilty" or words to that effect, suggests to the jury that on the question of fact the court favors the defendant. When jurors are examined as to their qualifications, they are committed to the rule that they will follow the law as charged by the court, and where the court repeatedly tells them to find the defendant not guilty, it is easy to understand that they may be misled into believing that the court is charging them, as a matter of law, to find for the defendant.

If this were a case where the evidence would warrant the conclusion that plaintiff's intestate was guilty of negligence, as a matter of law, in failing to exercise due care for his own safety, defendants' argument that "under the evidence, no other result could reasonably have been expected, had the instructions complained of not been given or that a different result could reasonably be expected on another trial," would merit careful consideration, but since we hold that the question whether plaintiff's intestate was in the exercise of due care, was properly one for the jury, in view of the location of the traffic light, the fact that the car passed beyond it, and the custom of crossing the intersection south of the light, as testified to by several witnesses, it was important that the instructions should not be misleading or prejudicial and should be free from the unwarranted and frequent repetitions of the phrases complained of.

For the reasons indicated, the judgment of the Superior court is reversed and the cause is remanded for retrial under proper instructions.

JUDGMENT REVERSED AND CAUSE REMANDED
FOR RETRIAL WITH DIRECTIONS.
Scanlan and Sullivan, JJ., concur.

misleading to the jury and prejudicial to plaintiff's cause, because to report culpably and needlessly the charge "then you should find the defendant not guilty" or words to that effect, suggests to the jury that on the question of fact the court favors the defendant. When jurors are examined as to their qualifications, they are committed to the rule that they will follow the law as charged by the court, and where the court repeatedly tells them to find the defendant not guilty, it is easy to understand that they may be misled into believing that the court is charging them, as a matter of law, to find for the defendant.

If this were a case where the evidence would warrant

the conclusion that plaintiff's intestate was guilty of negligence, as a matter of law, in failing to exercise due care for his own safety, defendants' argument that "under the evidence, no other result could reasonably have been expected, had the instructions complained of not been given or that a different result could reasonably be expected on another trial," would merit careful consideration, but since we hold that the question whether plaintiff's intestate was in the exercise of due care, was properly one for the jury, in view of the location of the traffic light, the fact that the car passed beyond it, and the custom of crossing the intersection south of the light, as testified to by several witnesses, it was important that the instructions should not be misleading or prejudicial and should be free from the unwarranted and frequent repetitions of the phrases complained

of.

For the reasons indicated, the judgment of the Superior court is reversed and the case is remanded for retrial under

proper instructions.
JAMES H. WATSON, JUDGE
FOR THE COURT

43457

PETER VAN BRUSSEL,
Appellee,

v.

ROBERT BARTLETT, d/b/a
Robert Bartlett Realty
Company,

Appellant.

214 A
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

328 I.A. 583²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant was engaged in the real estate business in Palos Heights, Illinois, where he maintained a barn and a team of horses. Plaintiff was a blacksmith, engaged in going to farms and riding stables for the purpose of shoeing horses. On June 22, 1943, in response to a telephone request, he called at defendant's barn to shoe a team of horses, and as he entered the stall of one of the horses, he was kicked and severely injured. Trial by jury resulted in a verdict and judgment for \$1750.00, from which defendant appeals. No question is raised as to the amount of the verdict or as to any of the instructions. The trial was fairly conducted, and the principal grounds urged for reversal are that plaintiff was guilty of contributory negligence, that plaintiff having full knowledge over a period of five years, of the horses that he was about to shoe, assumed any risk coincident with his work, and that in view of the uncontroverted testimony of plaintiff and all of defendant's witnesses that at no time prior to the occurrence had the horse shown any vicious propensities, there was no duty on defendant to warn anybody of danger, and therefore the court should have directed a verdict for defendant at the close of plaintiff's case.

The salient evidence adduced upon the hearing may be summarized as follows. Plaintiff testified that he was requested by defendant to come to his farm to shoe his two horses; that when he arrived there he saw the foreman,

PRINCE VAN LINDSEY,
Appellee,

v.

NORRIS BARNETT, d/b/a
Robert Barnette Realty
Company,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

3281.A.588

MR. PRESIDING JUSTICE FELIX DELIVERED THE OPINION OF THE COURT.

Defendant was engaged in the real estate business in

Palos Heights, Illinois, where he maintained a barn and a
team of horses. Plaintiff was a blacksmith, engaged in going
to farms and riding stables for the purpose of shoeing horses.

On June 22, 1945, in response to a telephone request, he
called at defendant's barn to shoe a team of horses, and as
he entered the stall of one of the horses, he was kicked and
severely injured. Trial by jury resulted in a verdict and

judgment for \$1750.00, from which defendant appeals. No

question is raised as to the amount of the verdict or as to
any of the instructions. The trial was fairly conducted, and

the principal grounds urged for reversal are that plaintiff
was guilty of contributory negligence, that plaintiff having
full knowledge over a period of five years, of the horses that
he was about to shoe, assumed any risk connected with his

work, and that in view of the uncontroverted testimony of
plaintiff and all of defendant's witnesses that at no time

prior to the occurrence had the horse shown any vicious
propensities, there was no duty on defendant to warn anybody

of danger, and therefore the court should have directed a
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quested by defendant to come to his farm to shoe his two
horses; that when he arrived there he saw the foreman,

Jousma, who showed him where the horses were, and when plaintiff asked him if he would go along, Jousma said that it was not necessary, "the horses were all right," that "there was a man there who would help me, so I went over to the barn with my helper." When he got to the barn he saw Edward Jacobs, who had charge of the barn and horses on defendant's farm, and told him that he and his helper had come to shoe the horses; that Jacobs said "all right," and then walked into the barn and got one horse, "and I walked in to get the other horse * * *. I could not say how he approached the one he was leading out because when I walked in, he was in front of that horse, untying him. I approached my horse as I always do, from the rear. As soon as I walked behind him, he kicked with both feet, not once, but several times and knocked me on the doors." Plaintiff sustained a broken arm and other injuries. He was first taken to a doctor in Blue Island, then to a hospital in Harvey, where X-rays disclosed a fractured arm. He remained at the hospital about three days, and had a cast on his arm from the date of the injury until August 4, when it was placed in a sling. His right leg was bruised so that he had difficulty in walking for several weeks, and there was undisputed evidence that he had not regained the full use of his arm subsequent to the accident.

Walter Witt, called as a witness on behalf of plaintiff, testified that he had conducted a riding stable in Palos Park since 1931; that he cut hay near defendant's ^{farm} barn, used to keep his machinery near the barn where the accident occurred, and on occasions walked over to the barn where the horses were kept; that in June or July of 1942 he talked with Jacobs, who told him "to be careful of the horses, that they were a little mean."

Jacobs, testifying on behalf of defendant, stated that before he went into the barn he told plaintiff "not to go in there.

Jonas, who showed him where the horses were, and when plain-
tiff asked him if he would go along, Jonas said that it was
not necessary, "the horses were all right," that "there was
a man there who would help me, so I went over to the barn with
my helper." Then he got to the barn he saw Edward Jacobs, who
had charge of the barn and horses on defendant's farm, and told
him that he and his helper had come to shoe the horses; that
Jacobs said "all right," and then walked into the barn and got
one horse, "and I walked in to get the other horse * * * I
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hospital about three days, and had a cast on his arm from the
date of the injury until August 4, when it was placed in a
slings. His right leg was bruised so that he had difficulty in
walking for several weeks, and there was undisputed evidence
that he had not regained the full use of his arm subsequent
to the accident.

Walter Pitt, called as a witness on behalf of plaintiff,
testified that he had conducted a riding stable in Fales Park
since 1911; that he cut hay near defendant's farm, used to keep
his machinery near the barn where the accident occurred, and on
occasions walked over to the barn where the horses were kept;
that in June or July of 1942 he talked with Jacobs, who told
him "to be careful of the horses, that they were a little mean."
Jacobs, testifying on behalf of defendant, stated that be-
fore he went into the barn he told plaintiff "not to go in there,

*** I did not tell him why I did not want him to go in. There was nothing else in the barn, but these two horses." Jacobs testified that the horses were in separate stalls which were not accessible through the front, but had openings from the front through which the horses could be fed. The day before the accident Jacobs had taken the horse which injured plaintiff, out of his stall, and he stated that "when I took him out ***, I untied him from the front, from the next stall. That is the way I was told to do it and that is the way I did it. *** I knew that the usual way of untying a horse is from the rear. That is the way I always did it when I was on the farm, but this particular horse, they told me to untie from the front. *** I told Van [plaintiff] not to go into the barn. I told him not to go into the barn, because Mr. Brown told me not to leave anybody in the barn. Mr. Brown is manager of the farm. I told Witt or anybody else that came there. I told everybody to stay out of the barn." On recross examination plaintiff's counsel propounded the following questions to, and received the following answers from, Jacobs: "Q. Isn't it a fact the order was issued because this horse was wild and you did not want anybody to get kicked? A. It was on their own good behavior. They wouldn't be kicked." When asked to explain his answer, the witness replied: "Well, if you were on good behavior they wouldn't kick." Further recross examination was as follows: "Q. That is, if you would go and unloosen them from the front, that particular one? A. Unloosen them from - you can't get in by the front to untie them. Q. Did you untie them from the front? A. Yes, from the next stall."

It further appears from the record that when plaintiff was called in rebuttal, he denied Jacobs' statement that he had told plaintiff not to go into the barn, saying "He did not make any such statement that day. He did not say anything. I told

any such statement that day. He did not say anything. I told
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told plaintiff not to go into the barn, saying "He did not make
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*** I did not tell him why I did not want him to go in. There

him that I came there to shoe the horse and he said all right. That is all that was said. He walked into the barn first and I walked after him." On cross-examination plaintiff testified that on prior occasions, when he had gone to defendant's farm to shoe these horses, one of the men employed on the farm or in charge of the barn "brought the horses out to me to shoe outside ***. I never shod any of them in the barn and whoever the man was that was in charge of the horses, always brought them out until the day of the accident." It likewise appears from plaintiff's testimony that on prior occasions he did not have a helper with him as he did on the day in question, that men on the farm helped him shoe the horses, and that the reason he accompanied Jacobs into the barn on the day in question was that the hour was growing late and he wanted to bring both horses out at the same time so that he and his helper could finish the job before dark.

The law is well settled in this state that persons are not bound to exercise care to avoid being injured by domestic animals not naturally dangerous, without notice of the vicious tendencies of the particular animal, and that whether or not the animal had theretofore displayed vicious tendencies was a question of fact for the jury. Burke v. Daley, 32 Ill. App. 326; Hammond v. Melton, 42 Ill. App. 186; Papszycki v. Gurka, 198 Ill. App. 507; and Rose v. Morton, 204 Ill. App. 108. In the light of these decisions it was a question of fact for the jury to determine whether defendant knew that the horse which injured plaintiff had shown any prior vicious tendencies of which plaintiff should have been apprised, and against which defendant was duty bound to afford plaintiff proper protection.

Thomas Howard, one of defendant's witnesses, raised and trained the horse in question on his farm in Iowa in 1936, and kept it there until 1939, when he sold it to Bartlett. The next

him that I came there to shoe the horse and he said all right. That is all that was said. He walked into the barn first and I waited after him." On cross-examination plaintiff testified that on prior occasions, when he had gone to defendant's farm to shoe these horses, one of the men employed on the farm or in charge of the barn brought the horses out to me to shoe outside. I never shoe any of them in the barn and never the man was that was in charge of the horses, always brought them out until the day of the accident. It likewise appears from plaintiff's testimony that on prior occasions he did not have a helper or with him as he did on the day in question, that men on the farm helped him shoe the horses, and that the reason he accompanied Jacobs into the barn on the day in question was that the horse was growing late and he wanted to bring both horses out at the same time so that he and his helper could finish the job before dark.

The law is well settled in this state that persons are not bound to exercise care to avoid being injured by domestic animals not naturally dangerous, without notice of the vicious tendencies of the particular animal, and that whether or not the animal had therefore displayed vicious tendencies was a question of fact for the jury. Burke v. Daley, 32 Ill. App. 326; Hammond v. Weston, 42 Ill. App. 186; Parasvekel v. Gurnea, 198 Ill. App. 507; and Case v. Horton, 204 Ill. App. 108. In the light of these decisions it was a question of fact for the jury to determine whether defendant knew that the horse which injured plaintiff had shown any prior vicious tendencies of which plaintiff should have been apprised, and against which defendant was duty bound to afford plaintiff proper protection.

Thomas Howard, one of defendant's witnesses, raised and trained the horse in question on his farm in Iowa in 1916, and kept it there until 1932, when he sold it to Bartlett. The next

time the witness saw it was in 1944 on defendant's farm, and he stated that during the time the horse was under his observation he never saw it do "anything mean or vicious or kick or have any trouble with him of any kind." A similar situation arose in Nau v. Standard Oil Co., 154 Ill. App. 421, where a large number of witnesses who had known the animal there in question before it was purchased by appellant, testified that it was not in the habit of kicking, but the court answered this contention by saying that "it does not follow from this that the preponderance of the evidence is, that at the time appellee was injured the animal was not vicious. She may not have been vicious when being worked on the farm, or during the brief time that she was in the hands of dealers, and may have shown viciousness after appellant bought her and she was placed in different surroundings. Whether or not the animal was vicious was a question of fact for the jury and it was within their province to determine, where and with whom, the preponderance of the evidence lay." In this proceeding Howard had not seen the horse which injured plaintiff, for several years, and there is evidence that during the interim several different persons drove and handled the horse on defendant's farm; the implication is that improper handling by any of these witnesses may have produced its viciousness.

The fact that plaintiff had previously shod this horse over a period of five years, would not indicate that he assumed any risk coincident with his work, unless he knew that the horse had vicious tendencies, and there is no evidence to support any such contention. On other occasions the horses were led from the barn by defendant's employees, and were shod outside without any difficulty. Nor is there any basis for the contention that the court should have directed a verdict for the defendant at the close of plaintiff's case. The controverted question whether this horse had previously displayed any vicious tendencies known

time the witness saw it was in 1944 on defendant's farm, and he stated that during the time the horse was under his observation he never saw it do "anything mean or vicious or kick or have any trouble with him or any thing." A similar situation arose in

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appellee bought her and she was placed in different surroundings. Whether or not the animal was vicious was a question of

fact for the jury and it was within their province to determine where and when, the preponderance of the evidence lay." In

this proceeding Howard had not seen the horse which injured plaintiff for several years, and there is evidence that during

the interim several different persons drove and handled the horse on defendant's farm; the implication is that improper handling

by any of these witnesses may have produced its viciousness. The fact that plaintiff had previously sold this horse

over a period of five years, would not indicate that he assumed any risk connected with his work, unless he knew that the horse

had vicious tendencies, and there is no evidence to support any such contention. On other occasions the horses were led from

the barn by defendant's employees, and were shed outside without any difficulty. Nor is there any basis for the contention that

the court should have directed a verdict for the defendant in the case of plaintiff's case. The controverted question whether

this horse had previously displayed any vicious tendencies known

to defendant, was a matter for the jury to determine, and the question of contributory negligence does not enter into the case because under the decisions heretofore cited, persons are not bound to exercise care to avoid being injured by domestic animals not naturally dangerous unless they have notice of the vicious tendencies of the particular animal.

The case was fairly tried, and therefore the judgment of the Circuit court should be and it is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

to defendant, was a matter for the jury to determine, and the question of contributory negligence does not enter into the case because under the decisions heretofore cited, persons are not bound to exercise care to avoid being injured by domestic animals not naturally dangerous unless they have notice of the vicious tendencies of the particular animal.

The case was fairly tried, and therefore the judgment of the Circuit court should be and it is affirmed.

JUDGMENT AFFIRMED.

Beaman and Sullivan, JJ., concur.

43366

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JAMES ROACH et al.,
Appellees,

v.

ROBERT J. DUNHAM, President Chicago
Park District, et al.,
Appellants.

215 A
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

328 I.A. 584

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This proceeding in mandamus was instituted on October 1, 1942 by James Roach and six others to compel the Chicago Park District and its appropriate officials to recognize the civil service status of plaintiffs and to certify and appoint them to designated positions in the classified civil service of said Chicago Park District. Thereafter on December 18, 1942 two others were allowed to intervene as co-plaintiffs. The cause was tried on the complaints filed by the original plaintiffs and the intervenors, defendants' answers thereto and a stipulation of facts. A writ of mandamus was awarded by the trial court and defendants appeal.

The Chicago Park District came into existence May 1, 1934 as the result of the consolidation of twenty-two independent park districts whose existence was merged in that of the Chicago Park District. Three of these independent park districts - West Park, South Park and Lincoln Park - were operating prior to the consolidation under the Park Civil Service Act (par. 86a, chap. 24-1/2, Ill. Rev. Stat. 1943). At the time of the consolidation all of the plaintiffs herein were temporary employees of either the West Park or Lincoln Park, both civil service park districts. All of the plaintiffs claim that they were entitled to the status of civil service employees under the Park Civil

43366

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JAMES ROACH et al.,
Appellees,

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

ROBERT J. LEWIS, President Chicago
Park District, et al.,
Appellants.

3381 A. 584

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This proceeding in mandamus was instituted on October 1, 1942 by James Roach and six others to compel the Chicago Park District and its appropriate officials to recognize the civil service status of plaintiffs and to certify and appoint them to designated positions in the classified civil service of said Chicago Park District. Thereafter on December 18, 1942 two others were allowed to intervene as co-plaintiffs. The cause was tried on the complaints, filed by the original plaintiffs and the intervenors, defendants' answers thereto and a stipulation of facts. A writ of mandamus was awarded by the trial court and defendants appeal.

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Service Act (par. 333.14, sec. 14, chap. 105, Ill. Rev. Stat. 1943). In other words they contend that by virtue of the provisions of said Act they became employees of the classified civil service of the new Chicago Park District on May 1, 1934, when the consolidation took effect, having been temporary employees of the aforementioned superseded park districts prior to and on said date. A like contention made in behalf of plaintiffs similarly situated, who were temporary employees of various non-civil^{service}/park districts which were superseded by the Chicago Park District, was upheld by the First Division of this court in People ex rel. Kelly v. Dunham, 313 Ill. App. 18. However, in People ex rel. Fox v. Dunham, 326 Ill. App. 562 (leave to appeal denied by the Supreme court), decided by the same division of this court on October 15, 1945, it was said at pp. 564, 565, 566:

"The plaintiffs claim that People ex rel. Kelly v. Dunham, 313 Ill. App. 18, is decisive of this case. We there considered these statutes and held that the employees of the non-civil service independent park districts at the time of the consolidation became entitled to recognition by the Chicago Park District as civil service employees. The Statute of Limitations was not pleaded there [People ex rel. Kelly v. Dunham, 313 Ill. App. 18] by the defendants, and the facts as to the issue of laches were entirely different. By the terms of the consolidation statute the Chicago Park District was to become effective May 1, 1934. The validity of the Act was apparently deemed doubtful by all parties. It was determined to be legal and valid by a decision of the Supreme Court in People v. Kelly, 357 Ill. 408. The opinion in that case (by a divided court) was filed in the Supreme Court August 23, 1934; rehearing was denied October 11, 1934. Up to about November 15 of that year the independent parks continued to operate, apparently with the co-operation, in part, and consent of the Chicago park commissioners and the acquiescence of everybody.

"From the commencement of their administration of the park district the commissioners and its civil service board have contended plaintiffs were not entitled to the status of civil service employees under the statute.

"This suit, as already stated, was not filed until August 7, 1942. Defendants contend (and in the trial court pleaded as a defense) that the actions were barred by the

Service Act (par. 333.14, sec. 14, chap. 105, Ill. Rev. Stat.

1943). In other words they contend that by virtue of the provisions of said Act they became employees of the classified civil service of the new Chicago Park District on May 1, 1954, when the consolidation took effect, having been temporary employees of the aforementioned superseded park districts prior to and on said date. A like contention made in behalf of plaintiffs similarly situated, who were temporary employees of various non-civil^{service} park districts which were superseded by the Chicago Park District, was upheld by the First Division of this court in People ex rel. Kelly v. Dunham, 313 Ill. App. 18. However, in People ex rel. Fox v. Dunham, 326 Ill. App. 562 (leave to appeal denied by the Supreme Court), decided by the same division of this court on October 12, 1945, it was said at pp. 564, 565, 566:

"The plaintiffs claim that People ex rel. Kelly v. Dunham, 313 Ill. App. 18, is decisive of this case. We there considered these statutes and held that the employees of the non-civil service independent park districts at the time of the consolidation became entitled to recognition by the Chicago Park District as civil service employees. The statute of limitations was not pleaded there (People ex rel. Kelly v. Dunham, 313 Ill. App. 18) by the defendants, and the facts as to the issue of locus were entirely different. By the terms of the consolidation statute the Chicago Park District was to become effective May 1, 1954. The validity of the Act was apparently deemed doubtful by all parties. It was determined to be legal and valid by a decision of the Supreme Court in People v. Kelly, 317 Ill. 403. The opinion in that case (by a divided court) was filed in the Supreme Court August 23, 1954; rehearing was denied October 11, 1954. Up to about November 12 of that year the independent parks continued to operate, apparently with the co-operation, in part, and consent of the Chicago Park Commissioners and the assistance of everybody.

"From the commencement of their administration of the park district the commissioners and its civil service board have contended plaintiffs were not entitled to the status of civil service employees under the statute.

"This suit, as already stated, was not filed until August 7, 1952. Defendants contend (and in the trial court pleaded as a defense) that the actions were barred by the

Statute of Limitations and by laches of the plaintiffs. These are, we hold, the controlling questions in this case. This suit was filed more than eight years after November, 1934, when the cause of action of plaintiffs and intervenors accrued.

"The Statute of Limitations (Ill. Rev. Stat. 1943, ch. 83, par. 16, sec. 15) provides:

"All civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrued."

"Other sections of the statute provide that if a person is out of the state his action may be commenced within the time limited after his coming into or return to the State, and that if after the cause of action accrues he departs from and resides out of the State, the time of his absence is no part of the time limited for the commencement of the action. These provisions shall not apply to any case when, at the time the cause of action accrued or shall accrue, neither the party against nor in favor of whom the same accrued or shall accrue were or are residents of the State. Section 22 [Ill. Rev. Stat. ch. 83, par. 23; Jones Ill. Stats. Ann. 107.282] also provides the bar of the statute shall not apply in case of fraudulent concealment, but there is no pleading in this case nor evidence tending to sustain any of these exceptions. It would seem on the undisputed facts here the present action is barred by the statute, and we so hold.

"Defendants also contend plaintiffs and intervenors are barred from maintaining their suits by gross laches. We have already held the cause of action accrued in November 1934, and stated the complaint was filed August 7, 1942; the intervenors' complaint September 18, 1942. The order appealed from was entered November 8, 1944. In other words, the suit was begun more than eight years after the cause of action accrued and the decree appealed from was entered more than two years thereafter. We are therefore now considering a case where the alleged right of action accrued more than ten years ago. The law of laches is strictly applied to rights claimed under civil service statutes."

We have quoted extensively from the Fox case because we consider it controlling here. In the instant case the facts upon which plaintiffs predicate their right to relief are identical with those in the Fox case. The cause of action of plaintiffs and the intervenors in the instant case accrued at the same time as the cause of action in the Fox case accrued. This suit was not filed until October 1, 1942, more than eight years after the cause of action accrued. The judgment order appealed from was entered December 21, 1944,

Statute of Limitations and by facts of the plaintiffs. These are, we hold, the controlling questions in this case. This suit was filed more than eight years after November, 1944, when the cause of action of plaintiffs and intervenors accrued.

"The Statute of Limitations (Ill. Rev. Stat. 1943, ch. 83, par. 12, sec. 15) provides:

"All civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrued."

"Other sections of the statute provide that if a person is out of the state his action may be commenced within the time limited after his coming into or return to the state, and that if after the cause of action accrues he departs from and resides out of the state, the time of his absence is no part of the time limited for the commencement of the action. These provisions shall not apply to any case when, at the time the cause of action accrued or shall accrue, neither the party against nor in favor of whom the same accrued or shall accrue were or are residents of the state. Section 22 [Ill. Rev. Stat. ch. 83, par. 22; Jones Ill. Stats. Ann. 1943, sec. 107.032] also provides the bar of the statute shall not apply in case of fraudulent concealment, but there is no pleading in this case nor evidence tending to sustain any of these exceptions. It could seem on the undisputed facts here the present action is barred by the statute, and we so hold.

"Defendants also contend plaintiffs and intervenors are barred from maintaining their suits by gross laches. We have already held the cause of action accrued in November, 1944, and stated the complaint was filed August 1, 1945, the intervenors' complaint September 18, 1945. In other words, the suit was entered November 5, 1944, in the case of the suit was begun more than eight years after the cause of action accrued and the decree appealed from was entered more than two years thereafter. The statute now considered has a clause where the alleged right of action accrued more than ten years ago. The law of laches is strictly applied to rights claimed under civil service statutes."

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we consider it controlling here. In the instant case the facts upon which plaintiffs predicate their right to relief are identical with those in the Fox case. The cause of action of plaintiffs and the intervenors in the instant case accrued at the same time as the cause of action in the Fox case accrued. This suit was not filed until October 1, 1945, more than eight years after the cause of action accrued. The judgment order appealed from was entered December 21, 1944,

more than ten years after the cause of action accrued. Defendants contend and pleaded in the trial court as a defense that the actions were barred by the statute of limitations and by laches of the plaintiffs. Inasmuch as the conclusions reached in the Fox case are in all respects applicable to the situation presented here, we are impelled to hold that plaintiffs and the intervenors are barred by laches in beginning and prosecuting this cause of action as well as by the statute of limitations.

The judgment order of the Superior court of Cook county is reversed.

JUDGMENT ORDER REVERSED.

Friend, P. J., and Scanlan, J., concur.

more than ten years after the cause of action accrued. Defendants contend and pleaded in the trial court as a defense that the actions were barred by the statute of limitations and by laches of the plaintiffs. Inasmuch as the conclusions reached in the Fox case are in all respects applicable to the situation presented here, we are impelled to hold that plaintiffs and the intervenors are barred by laches in beginning and prosecuting this cause of action as well as by the statute of limitations. The judgment order of the Superior Court of Cook County is reversed.

JUDGMENT ORDER REVERSED.

Tracy, P. J., and Geanlan, J., concur.

43614

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

LAURA BAILEY,

Plaintiff in Error.

216 A
} ERROR TO MUNICIPAL

} COURT OF CHICAGO.

} 323 I.A. 584²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant, Laura Bailey, seeks to reverse the judgment order of the Municipal Court of Chicago which found her guilty "in manner and form as charged in the information herein," denied her application for probation, adjudged her guilty on the aforesaid finding of the criminal offense of "unlawfully and wickedly keeping and maintaining a house of ill fame, a place for the practice of prostitution and lewdness," and sentenced her to serve one year in the House of Correction and to pay a fine of one dollar. Defendant waived trial by jury and the cause was tried by the court on her plea of not guilty. Defendant's motions for a new trial and in arrest of judgment were overruled.

The information upon which the defendant was tried reads as follows:

"STATE OF ILLINOIS,)
COUNTY OF COOK,)
CITY OF CHICAGO.)

ss. In The Municipal Court of Chicago

VERA JEAN CURINGTON

a resident of the City of Chicago in the State aforesaid, in his own proper person, comes now here into court, and in the name and by the authority of the People of the State of Illinois, gives the Court to be informed and understand that Laura Bailey heretofore, to-wit: on the 14th day of OCTOBER, A.D. 1945, at the City of Chicago aforesaid

Did then and there unlawfully and wickedly keep, and maintain a house of ill-fame, or place for the practice of prostitution or lewdness, to the encouragement of idleness, gaming, drinking, fornication or other misbehavior, or did let a house room, or other premises for such purpose to-wit at 325 E. 57th St. 1 floor Apt.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
LAURA BAILEY,
Plaintiff in Error.

323 I.A. 584

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant, Laura Bailey, seeks

to reverse the judgment order of the Municipal Court of

Chicago which found her guilty "in manner and form as

charged in the information herein," denied her application

for probation, adjudged her guilty on the aforesaid finding

of the criminal offense of "unlawfully and wickedly keeping

and maintaining a house of ill fame, a place for the prac-

tice of prostitution and lewdness," and sentenced her to

serve one year in the House of Correction and to pay a fine

of one dollar. Defendant waived trial by jury and the cause

was tried by the court on her plea of not guilty. Defend-

ant's motions for a new trial and in arrest of judgment

were overruled.

The information upon which the defendant was tried

reads as follows:

"STATE OF ILLINOIS;
COUNTY OF COOK,
CITY OF CHICAGO,
ss. In The Municipal Court of Chicago

VERA JEAN CUNNINGTON

a resident of the City of Chicago in the State aforesaid, in
his own proper person, comes now here into court, and in the
name and by the authority of the People of the State of
Illinois, gives the Court to be informed and understand that
Laura Bailey heretofore, to-wit: on the 14th day of OCTOBER,
A.D. 1945, at the City of Chicago aforesaid

did then and there unlawfully and wickedly keep, and
maintain a house of ill-fame, or place for the prac-
tice of prostitution or lewdness, to the encourag-
ment of idleness, gaming, drinking, prostitution or
other misbehavior, or did let a house room, or other
premises for such purpose to-wit at 325 E. 57th st.
1 floor Apt.

In Violation of Par 162 of Chap. 38 Illinois Revised
Statutes 1941

contrary to the form of the Statute in such case made and
provided, and against the peace and dignity of the People
of the State of Illinois."

The verification of the information was in the follow-
ing form:

"STATE OF ILLINOIS,)
COUNTY OF COOK,) ss.
CITY OF CHICAGO.)

being first duly sworn, on her oath, deposes and says that
she resides at 631 E. 45th St, that she has read the fore-
going information by her subscribed and that the same is
true.

Vera Jean Curington

Subscribed and sworn to before me
this _____ day of Oct 17 1945 A.D.

JOSEPH E. GILL
Clerk of the Municipal Court of
Chicago."

Defendant contends that "the information being in the
disjunctive form did not apprize the defendant of the specific
and particular charge or crime that the defendant had to meet
and defend against on the trial of said cause."

There is no merit in this contention. The information
might have been more aptly drawn but it is not disjunctive in
form. After properly charging the defendant with unlawfully
keeping and maintaining a house of ill fame, the information
went on to state "or did let a house, room, or other premises
for such purpose to-wit at 325 E. 57th St. 1 floor Apt." The
language following the word "or" could not possibly be con-
strued as charging a separate offense. It was merely explana-
tory of the only offense charged - keeping a house of ill fame
- and its sole purpose was to state the address of such house.
In Blemer v. People, 76 Ill. 265, the Supreme court points
out that where, as here, the word "or" is used in the sense
of "to-wit" , that is, in explanation of what precedes, it

In Violation of Par 162 of Chap. 18 Illinois Revised Statutes 1941

contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

The verification of the information was in the follow-

ing form:

"STATE OF ILLINOIS,
COUNTY OF COOK,
CITY OF CHICAGO,
ss.

being first duly sworn, on her oath, deposes and says that she resides at 501 E. 47th St., that she has read the foregoing information by her subscribed and that the same is true.

Very truly yours,

Subscribed and sworn to before me this day of Oct 17 1941 A.D.

JOSEPH E. GILL

Clerk of the Municipal Court of Chicago."

Defendant contends that "the information being in the alternative form did not apprise the defendant of the specific and particular charges or crime that the defendant had to meet and defend against on the trial of said cause."

There is no merit in this contention. The information might have been more aptly drawn but it is not alternative in form. After properly charging the defendant with unlawfully keeping and maintaining a house of ill fame, the information went on to state "or did let a house, room, or other premises for such purpose to-wit at 312 E. 47th St. I there wot." The language following the word "or" could not possibly be construed as charging a separate offense. It is merely explanatory of the only offense charged - keeping a house of ill fame - and its sole purpose was to state the address of such house. In People v. People, 70 Ill. 2d, the Supreme Court points out that there, as here, the word "or" is used in the sense of "to-wit", that is, in explanation of what precedes, it

does not make the information doubtful or duplicitous.

Defendant further contends that "the information does not purport to have been sworn to by affidavit or anyone else - the affiant's name having been omitted in the charging part thereof, and the information fails to allege that the particular house of prostitution was in Chicago."

There is not the slightest merit in this contention. The information specifically charged that defendant operated the particular house of ill fame in Chicago. It is idle to urge that the information was not properly verified. It was sworn to by the same person who signed it. In any event, even though the information was not sworn to or the verification thereof was otherwise defective, defendant by going to trial without objection that the information was not sworn to or verified in the proper manner, waived such objection. (People v. Billow, 377 Ill. 236.)

It is finally contended that "the denial of the application of the defendant for probation immediately upon making the request by the defendant, is tantamount to an arbitrary abuse of judicial power, and is reversible error."

In support of this contention defendant relies upon People v. Donovan, 376 Ill. 602. In that case the defendant, who was twenty years old, was indicted for forging a ten dollar check. He was not represented by counsel. Upon his arraignment he pleaded guilty and asked to be placed on probation. His request was denied and he was sentenced to the penitentiary. Five days later counsel employed by his father filed a motion to set aside the judgment and for leave to withdraw the plea of guilty and to enter a plea of not guilty. It was contended that the trial court erred "in sentencing him to the penitentiary and refusing his application for probation without causing an investigation to be made by the

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Defendant further contends that "the information does
not purport to have been sworn to by affidavit or anyone
else - the affidavit's name having been omitted in the charging
part thereof, and the information fails to allege that the
particular house of prostitution was in Chicago."
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the particular house of ill fame in Chicago. It is idle to
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event, even though the information was not sworn to or the
verification thereof was otherwise defective, defendant by
going to trial without objection that the information was not
sworn to or verified in the proper manner, waived such objec-
tion. (People v. Wilson, 377 Ill. 236.)
It is finally contended that "the denial of the applica-
tion of the defendant for probation immediately upon making
the request by the defendant, is tantamount to an arbitrary
abuse of judicial power, and is reversible error."
In support of this contention defendant relies upon
People v. Foreman, 376 Ill. 602. In that case the defendant,
who was twenty years old, was indicted for forging a ten
dollar check. He was not represented by counsel. Upon his
arraignment he pleaded guilty and asked to be placed on pro-
bation. His request was denied and he was sentenced to the
penitentiary. Five days later counsel employed by his father
filed a motion to set aside the judgment and for leave to
withdraw the plea of guilty and to enter a plea of not guilty.
It was contended that the trial court erred in sentencing
him to the penitentiary and refusing his application for
probation without causing an investigation to be made by the

probation officer and procuring his recommendation as the statute provides, and in sentencing him without hearing evidence on the question of aggravation and mitigation of the offense charged." It appeared that statements were made to the court by the state's attorney in aggravation of the offense but that the trial court heard no evidence in mitigation thereof and that probation was refused without referring defendant's application therefor to the probation officer for investigation and recommendation. There it was said by the court at pp. 606-607:

"When paragraphs 732 and 786 [Criminal Code, chap. 38, Ill. Rev. Stat. 1939] are considered together, as required by all rules of statutory construction, it is manifest the legislature intended not only that an application for probation shall be investigated by the probation officer, but that the People and the defendant are entitled to have the court hear evidence in aggravation and mitigation of the offense, as bearing upon the question of whether the defendant shall be admitted to probation, as well as the conditions to be imposed, in case probation is granted. It would be an anomaly to hold that the court, in determining those questions, is confined either to the report of the probation officer, who might be unwittingly prejudiced against or in favor of the defendant, or representations made by the State's attorney. The duty of the court to make a full and complete investigation, and the rights of the parties thereto clearly appear. The duties required of the probation officer demonstrate that his investigation is designed to assist the court in determining factors which would impinge upon the time of the court, but it is in no way conclusive upon the court, or the parties.

"The claim of defendant in error that paragraph 786 requires an investigation only when an application for probation is granted, and has no application to a request for probation which is denied, is so groundless as to need no discussion. The language 'and such other facts as may aid the court as well in determining the propriety of probation' clearly demonstrates that the legislature intended an investigation of the facts in every application for probation."

It might seem from the language used in the foregoing quotation from the Donovan case that the Supreme court held that an investigation by the probation officer is mandatory in every case where an application for probation is made.

However, the Donovan case has been distinguished in

probation officer and presenting his recommendation as the statute provides, and in doing so without hearing evidence on the question of aggravation and mitigation of the offense charged." It appeared that statements were made to the court by the state's attorney in aggravation of the offense but that the trial court heard no evidence in mitigation thereof and that probation was refused without referring defendant's application therefor to the probation officer for investigation and recommendation. There is was said by the court at pp. 606-607:

"When paragraphs 732 and 736 [Criminal Code, chap. 36, Ill. Rev. Stat. 1929] are considered together, as required by all rules of statutory construction, it is manifest the legislature intended not only that an application for probation shall be investigated by the probation officer, but that the people and the defendant are entitled to have the court hear evidence in aggravation and mitigation of the offense, as bearing upon the question of whether the defendant shall be admitted to probation, as well as the conditions to be imposed, in case probation is granted. It would be an anomaly to hold that the court, in determining those questions, is confined either to the report of the probation officer, who might be unwittingly prejudiced against or in favor of the defendant, or representations made by the state's attorney. The duty of the court to make a full and complete investigation, and the rights of the parties thereto, clearly appear. The duties required of the probation officer demonstrate that his investigation is designed to assist the court in determining factors which would impinge upon the time of the court, but it is in no way conclusive upon the court, or the parties."

"The claim of defendant in error that paragraph 736 requires an investigation only when an application for probation is granted, and has no application to a request for probation which is denied, is so groundless as to need no discussion. The language, and such other facts as may aid the court as well in determining the propriety of probation, all clearly demonstrate that the legislature intended an investigation of the facts in every application for probation."

It might seem from the language used in the foregoing quotation from the Boyover case that the supreme court held that an investigation by the probation officer is mandatory in every case where an application for probation is made. However, the Boyover case has been distinguished in

two later cases - People v. Harrison, 392 Ill. 511 and People v. Brown, 392 Ill. 519. These cases were decided after the instant case was tried and after defendant's original brief was filed in this court.

In the Harrison case the defendant was tried upon his plea of guilty to three indictments charging him with robbery without a weapon, which three indictments were consolidated for hearing. Defendant's application for probation was denied and he was sentenced to the penitentiary. Relying on the Donovan case, it was urged as ground for reversal that the trial court erred in denying defendant's application for probation without having same investigated by a probation officer. It appeared that the trial court conducted a hearing on defendant's application for probation without referring such application to the probation officer for an investigation, that on such hearing the state's attorney presented all available evidence in aggravation of the offenses charged, that defendant presented all available evidence in mitigation of said offenses and that the defendant and his attorney had supplied as complete information concerning defendant's history and previous conduct as the probation department could have furnished if the application for probation had been referred to it for investigation. In the Harrison case, in distinguishing the Donovan case, the court said at pp. 517-518:

"Defendant relies upon People v. Donovan, 376 Ill. 602, as being decisive in his favor. There, the defendant was convicted of forgery upon his plea of guilty, the punishment for this crime being an indeterminate sentence. Donovan was not represented by counsel. Thereafter, a motion was made to vacate the judgment and for permission to withdraw the plea of guilty. Affidavits were filed by the State's Attorney of Lee county in support of his answer resisting the motion. Evidence was adduced in aggravation but not in mitigation of the offense. Considering the statutory provisions (pars. 732

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"Defendant relies upon People v. Donovan, 392 Ill. 502, as being decisive in his favor. There, the defendant was convicted of larceny upon his plea of guilty, the punishment for this crime being an indeterminate sentence. Donovan was not represented by counsel. Thereafter, a motion was made to vacate the judgment and for permission to withdraw the plea of guilty. Affidavits were filed by the state's attorney of Lee County in support of his answer resisting the motion. Evidence was adduced in aggravation but not in mitigation of the offense. Considering the statutory provisions (para. 732

and 786) together, we observed: 'The discretion the court may exercise upon an application for probation is not an arbitrary discretion to be exercised at the mere will or whim of the court, but is a sound legal discretion dependent for its exercise upon the facts shown. It is obvious that where the facts are not shown and are not inquired into, the denial of probation is an arbitrary and unauthorized exercise of the power.' Here, the facts were adequately disclosed. A full inquiry was made and the trial judge had an exceptionally complete history of the defendant's life before him when he imposed sentence.

"After evidence in aggravation and mitigation was heard, defendant's attorney said he would like an application for probation entered, not that he thought he would get probation but so the court could have a complete history. The court asked if he was asking for probation and the attorney replied: 'Just so your honor will get a complete history of this boy.' The court recounted everything proved in the case and commented that everything was shown that a probation officer could find except whether he attended church. Defendant then testified that he did at times attend church. The court then said: 'This is all the information the probation department would get so we know as much about it today as we ever will. Is that right?' Probation was then denied and the sentence was for a minimum of five and a maximum of ten years. The attorney said that was too much, but made no exceptions or protest against denying probation. It seems clear that all the facts that could be shown were shown, and the attorney regarded it as a hearing for probation and took no exception to the manner of hearing by the court instead of by the probation officer. No claim is made that any additional facts could be adduced which would result in a different action by the court. We think the record is sufficient to show either a waiver of referring the matter to the probation department or an agreement to have the evidence submitted to the court considered as a hearing for probation. In either event the case of People v. Donovan, 376 Ill. 602, would be inapplicable, because the element of arbitrary action is wanting and because the defendant has had the benefit of a hearing."

But defendant states in her reply brief that "the case of the defendant in the instant case and the case of The People v. Harrison cited by defendant in error is not only not in point but wholly inapplicable and should have no bearing upon this court" and that "it could readily be seen that if the court in any case before it should possess an arbitrary discretion to refuse an application for probation in a case upon a plea of not guilty, when the facts concerning a defendant's past life and history do not necessarily have to come before the court, as they could upon a plea of guilty, where under

and 786) together, we observed: "The discretion the court may exercise upon an application for probation is not an arbitrary discretion to be exercised at the mere will or whim of the court, but is a sound legal discretion dependent for its exercise upon the facts shown. It is obvious that where the facts are not shown and are not inquired into, the denial of probation is an arbitrary and unauthorized exercise of the power." Here, the facts were arbitrarily denied. A full inquiry was made and the trial judge had an exceptionally complete history of the defendant's life before him when he imposed sentence.

"After evidence in aggravation and mitigation was heard, defendant's attorney said he would like an application for probation entered, not that he thought he would get probation but so the court could have a complete history. The court asked if he was asking for probation and the attorney replied, 'Just so your honor will get a complete history of this boy.' The court recounted everything proved in the case and said that everything was shown that a probation officer could find except whether he attended church. Defendant then testified that he did attend church. The court then said: 'This is all the information the probation department would get so we know as much about it today as we ever will. Is that right?' Probation was then denied and the sentence was for a minimum of five and a maximum of ten years. The attorney said that was too much, but made no exceptions or protest against denying probation. It seems clear that all the facts that could be shown were shown, and the attorney regarded it as a hearing for probation and took no exception to the manner of hearing by the court instead of by the probation officer. He claims he made that an additional fact could be adduced which would result in a different action by the court. We think the record is sufficient to show either a waiver of referring the matter to the probation department or an agreement to have the evidence submitted to the court considered as a hearing for probation. In either event the case of People v. Donovan, 170 Ill. 622, would be inapplicable, because the element of arbitrary action is wanting and because the defendant had the benefit of a hearing."

But defendant states in her reply brief that "the case of the defendant in the instant case and the case of The People v. Harrison cited by defendant in error is not only not in point but wholly inapplicable and should have no bearing upon this court" and that "it could readily be seen that if the court in any case before it should possess an arbitrary discretion to refuse an application for probation in a case upon a plea of not guilty, then the facts concerning defendant's past life and history do not necessarily have to come before the court, as they could upon a plea of guilty, where under

the statute the court must hear evidence in aggravation and mitigation of the offense, such an assumed discretion was never contemplated by the legislature in enacting the probation statute, and such a line of procedure would practically nullify the benefits that accrue to a defendant under the Act." As to her position in this regard defendant neglected, inadvertently or otherwise, to discuss or even refer to the case of People v. Brown, *supra*, where the defendant was tried by the court without a jury on his plea of not guilty to an indictment charging manslaughter. In that case defendant's application for probation was not referred to the probation department for investigation. There, after reviewing the evidence and holding that it warranted the trial court in finding that the defendant was guilty beyond a reasonable doubt, the Supreme court said at pp. 522-523:

"Defendant's counsel asked the court if he would consider probation. The court replied that he would not, that he would accept the motion, but would refuse it. On this proposition the court said: 'Except for this particular act, of course, his reputation and his conduct have been apparently all right. But from this evidence the court is not justified in giving probation. I could have an examination made, but it wouldn't disclose any more than we probably know here. He is lucky he is not charged with murder.' It is perfectly apparent the court was willing to consider that the defendant was one who would be eligible for probation, except for the extremely serious nature of the crime and the facts surrounding it. We have several times held that we cannot review the discretion of the trial court in granting or refusing probation. People v. Denning, 372 Ill. 549; People v. Racine, 362 Ill. 602; People v. Wheeler, 349 Ill. 230.

"Plaintiff in error calls our attention to People v. Donovan, 376 Ill. 602. The facts in that case are not parallel. In that case a young man twenty years of age was indicted for forging a small check; he pleaded guilty, and, in refusing his application for probation, the court heard evidence in aggravation of the offense, and refused to hear evidence in mitigation. The defendant had pleaded guilty without counsel. In that case we held that the discretion given the court was not arbitrary discretion. In this case the court did receive the application for probation, and did consider that the defendant's reputation and previous conduct were good. He did determine, however, that the facts surrounding the commission of the crime were so serious that he would not be justified in granting probation. When facts which could have been shown by hearing are considered as proved by the court, there could be no abuse of discretion in denying probation in this case."

the state the court must hear evidence in aggravation and mitigation of the offense, such an assumed discretion was never contemplated by the legislature in enacting the probation statute, and such a line of procedure would practically nullify the benefits that accrue to a defendant under the Act. As to her position in this regard defendant neglected, indirectly or otherwise, to discuss or even refer to the case of People v. Brown, supra, where the defendant was tried by the court without a jury on his plea of not guilty to an indictment charging manslaughter. In that case defendant's application for probation was not referred to the probation department for investigation. There, after reviewing the evidence and holding that it warranted the trial court in finding that the defendant was guilty beyond a reasonable doubt, the Supreme court said at pp. 322-323:

"Defendant's counsel asked the court if he would consider probation. The court replied that he would not, that he would accept the motion, but would refuse it. On this proposition the court said: 'Except for this particular act, of course, his reputation and his conduct have been apparently all right. But from this evidence the court is not justified in giving probation. I could have an examination made, but it wouldn't disclose any more than we probably know here. We are fairly well charged with murder. It is perfectly apparent the court was willing to consider that the defendant was one who would be eligible for probation, except for the extremely serious nature of the crime and the facts surrounding it. We have several times held that we cannot review the discretion of the trial court in granting or refusing probation. People v. Bennett, 172 Ill. 147; People v. Brown, 302 Ill. 302; People v. Pfeiffer, 349 Ill. 230."

"Plaintiff in error calls our attention to People v. Donovan, 376 Ill. 602. The facts in that case are not parallel. In that case a young man twenty years of age was indicted for forcing a small check; he pleaded guilty, and, in refusing his application for probation, the court heard evidence in aggravation of the offense, and refused to hear evidence in mitigation. The defendant had pleaded guilty without counsel. In that case we held that the discretion given the court was not arbitrary discretion. In this case the court did not give the application for probation, and did consider that the defendant's reputation and previous conduct were good. He did determine, however, that the facts surrounding the commission of the crime were so serious that he would not be justified in granting probation. When facts which could have been shown by hearing are considered as proved by the court, there could be no abuse of discretion in denying probation in this case."

It seems clear from the Harrison case that if a defendant is tried on a plea of guilty to an indictment or information charging him with the commission of a criminal offense and he makes an application for probation, the trial court may properly dispense with an investigation by the probation department if a hearing is had on such application upon which the state's attorney and the defendant are respectively permitted to present evidence in aggravation and mitigation of the offense and the trial judge is just as fully apprised on such hearing of defendant's previous life and conduct as he would have been if a probation officer had investigated same and made a report thereon. It seems just as clear from the Brown case that, where a defendant is tried on a plea of not guilty to an indictment or information charging a criminal offense and is found guilty and then makes an application for probation, the court may properly dispense with an investigation by the probation department if the trial judge received such application and denied probation because of the enormity of the crime or because the facts in the case were so serious that he would not be justified in granting probation, notwithstanding he considered that the defendant's reputation and previous conduct were good.

What is the situation here? As heretofore shown, defendant was tried by the court on her plea of not guilty. After she was found guilty an application for probation was made in her behalf. She asserts that same was denied "instanter" or "immediately". The record does not so show. The order entered was "application for probation denied." It is significant that defendant did not include a bill of exceptions in the record filed in this court. It is true that no investigation by the probation department was ordered in connection with defendant's application for probation. It also may well be true that a

It seems clear from the Harrison case that if a defendant is tried on a plea of guilty to an indictment or information charging him with the commission of a criminal offense and he makes an application for probation, the trial court may properly dispense with an investigation by the probation department if a hearing is had on such application upon which the state's attorney and the defendant are respectively permitted to present evidence in aggravation and mitigation of the offense and the trial judge is just as fully apprised on such hearing of defendant's previous life and conduct as he would have been if a probation officer had investigated same and made a report thereon. It seems just as clear from the Gray case that, where a defendant is tried on a plea of not guilty to an indictment or information charging a criminal offense and is found guilty and then makes an application for probation, the court may properly dispense with an investigation by the probation department if the trial judge received such application and denied probation because of the gravity of the crime or because the facts in the case were so serious that he would not be justified in granting probation, notwithstanding he considered that the defendant's reputation and previous conduct were good.

What is the situation here? As heretofore shown, defendant was tried by the court on her plea of not guilty. After she was found guilty an application for probation was made in her behalf. She asserts that same was denied "instantly" or "immediately". The record does not so show. The order entered was "application for probation denied." It is significant that defendant did not include a bill of exceptions in the record filed in this court. It is true that no investigation by the probation department was ordered in connection with defendant's application for probation. It also may well be true that a

full hearing was held by the trial court on her application for probation which rendered an investigation by the probation department unnecessary or that the trial court heard evidence as to her reputation and previous conduct and refused to grant her probation because of the serious nature of the crime committed by her. In the absence of a bill of exceptions it will be presumed that the trial court acted properly in the disposition of defendant's application for probation.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

full hearing was held by the trial court in the afternoon
for probation which rendered an investigation by the pro-
secution department unnecessary or that the trial court heard
evidence as to her reputation and previous conduct and re-
fused to grant her probation because of the serious nature
of the crime committed by her. In the absence of a bill of
exceptions it will be presumed that the trial court acted
properly in the disposition of defendant's application for
probation.

The judgment of the Municipal Court of Chicago is

affirmed.

JUDGMENT AFFIRMED.

TRINIDAD, P. J., and DOMINIAN, J., concur.

43684

EDWIN JOHNSON,
Appellant,

v.

CHESTER HARMAN,
Appellee.

717 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

328 I.A. 585

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff, Edwin Johnson, seeks to reverse the final order of the trial court which sustained the motion of defendant, Chester Harman, to strike plaintiff's statement of claim and entered judgment in favor of defendant for costs.

Plaintiff's statement of claim is as follows:

"That in or about the month of August 1941, at Chicago in said Cook County, the defendant, Chester Harman (who was then a member of the Tenth Ward Republican Organization in Chicago) represented to the plaintiff that he could obtain the appointment of the plaintiff as a State Highway Maintenance Police Officer for the State of Illinois.

"That at or about the aforesaid time the defendant also falsely and fraudulently informed the plaintiff and falsely and fraudulently represented to the plaintiff that in order to obtain the appointment of the plaintiff as such State Highway Maintenance Police Officer the defendant would be obliged to pay to one John T. Dempsey (who was then Chairman of the Cook County Central Committee of the Republican party) and one Walker Butler [State Senator] the sum of Five Hundred and Fifty Dollars (\$550.00).

"That the plaintiff, desiring to obtain such appointment as State Highway Maintenance Police Officer for the State of Illinois, and relying upon the aforesaid false and fraudulent representation of the defendant that to secure such appointment for the plaintiff it was necessary that the defendant pay to said John T. Dempsey and said Walker Butler the sum of Five Hundred Fifty Dollars (\$550.00) the plaintiff did pay to the defendant at three different times in the months of August and September in the year 1941, said sum of Five Hundred Dollars (\$550.00) in three installments, one of Three Hundred Dollars (\$300.00), one of One Hundred Seventy-five Dollars (\$175.00), and one of Seventy-five Dollars (\$75.00), all in cash or currency of the United States of America.

"That said statements of the defendant to the plaintiff were wholly false and untrue and this defendant is informed and believes and therefore states the fact to be that said

EDWIN JOHNSON, Appellant,

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

CHESTER HARMAN, Appellee.

32814.585

MRS. JUSTICE SWANLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff, Edwin Johnson, seeks to reverse the final order of the trial court which sustained the motion of defendant, Chester Harman, to strike plaintiff's statement of claim and entered judgment in favor of defendant for costs.

Plaintiff's statement of claim is as follows:

"That in or about the month of August 1941, at Chicago in said Cook County, the defendant, Chester Harman (who was then a member of the Tenth Ward Republican Organization in Chicago) represented to the plaintiff that he could obtain the appointment of the plaintiff as a State Highway Maintenance Police Officer for the State of Illinois.

"That at or about the aforesaid time the defendant also falsely and fraudulently informed the plaintiff and falsely and fraudulently represented to the plaintiff that in order to obtain the appointment of the plaintiff as such State Highway Maintenance Police Officer the defendant would be obliged to pay to one John T. Dempsey (who was then Chairman of the Cook County Central Committee of the Republican party) and one Walter Butler (State Senator) the sum of five hundred and fifty dollars (\$550.00).

"That the plaintiff, desiring to obtain such appointment as State Highway Maintenance Police Officer for the State of Illinois, and relying upon the aforesaid false and fraudulent representation of the defendant that to secure such appointment for the plaintiff it was necessary that the defendant pay to said John T. Dempsey and said Walter Butler the sum of five hundred fifty dollars (\$550.00) the plaintiff did pay to the defendant at three different times in the months of August and September in the year 1941, said sum of Five Hundred Dollars (\$500.00) in three installments, one of Three Hundred Dollars (\$300.00), one of One Hundred Seventy-five Dollars (\$175.00), and one of Twenty-five Dollars (\$25.00), all in cash or currency of the United States of America.

"That said statements of the defendant to the plaintiff were wholly false and untrue and this defendant is informed and believes and therefore states the fact to be that said

defendant was not required to pay, and did not pay, said sum of Five Hundred and Fifty Dollars (\$550.00) to said John T. Dempsey and said Walker Butler to obtain the appointment of the plaintiff as State Highway Maintenance Police Officer for the State of Illinois.

"That the plaintiff implicitly relied upon said statements and representations made to him by said defendant.

"That the defendant wilfully and maliciously made said statements and representations, knowing them to be false, and untrue, with the purpose that the plaintiff should act thereon to his loss and damage.

"Wherefore, the plaintiff demands judgment against the defendant for the sum of Five Hundred Fifty Dollars (\$550.00) with interest thereon from October 1, 1941 to the date of the entry of such judgment."

Defendant's motion averred that the statement of claim should be stricken because (1) it "states no reasonable cause of action and is incapable of being so amended as to state a reasonable cause of action" and (2) it "is defective and insufficient * * * in that the subject matter of the claim and the contract pleaded is in violation of the public policy of the State of Illinois and therefore illegal and void."

Plaintiff's theory as stated in his brief is that "because the defendant obtained the money from the plaintiff through fraud and false representations and because the defendant never paid or used this money for the purpose for which he obtained the same from the plaintiff, and because the defendant retained the same for his own use, the guilt or turpitude of the defendant much exceeds that of the plaintiff; and that the plaintiff and the defendant are not in pari delicto, or equally guilty in this transaction. That under the great weight of authority (including that of the courts of Illinois) the more innocent of two parties, especially the one who has been defrauded by the other, such as the plaintiff in this case, may recover from the defrauder. And also that the defendant never consummated the alleged illegal transaction, the alleged illegality of which he is

defendant was not required to pay, and did not pay, said sum of five hundred and fifty dollars (\$550.00) to said John T. Demsey and said Walter Butler to obtain the appointment of the plaintiff as State Highway Maintenance Police Officer for the State of Illinois.

"That the plaintiff implicitly relied upon said statements and representations made to him by said defendant.

"That the defendant willfully and maliciously made said statements and representations, knowing them to be false, and untrue, with the purpose that the plaintiff should act thereon to his loss and damage.

"Wherefore, the plaintiff demands judgment against the defendant for the sum of Five Hundred Fifty Dollars (\$550.00) with interest thereon from October 1, 1945 to the date of the entry of such judgment."

Defendant's motion avers that the statement of claim should be stricken because (1) it "states no reasonable cause of action and is incapable of being so amended as to state a reasonable cause of action" and (2) it "is defective and insufficient" * in that the subject matter of the claim and the contract pleaded is in violation of the public policy of the State of Illinois and therefore illegal and void."

Plaintiff's theory as stated in his brief is that "because the defendant obtained the money from the plaintiff through fraud and false representations and because the defendant never paid or used this money for the purpose for which he obtained the same from the plaintiff, and because the defendant retained the same for his own use, the guilt or turpitude of the defendant much exceeds that of the plaintiff; and that the plaintiff and the defendant are not in pari delicto, or equally guilty in this transaction. That under the great weight of authority (including that of the courts of Illinois) the more innocent of two parties, especially the one who has been defrauded by the other, such as the plaintiff in this case, may recover from the defendant. And also that the defendant never consummated the alleged illegal transaction, the alleged illegality of which he is

now attempting to use as a defense; and also that a much stronger public policy requires that the defendant should not be permitted to retain this money obtained by him through fraud and false representations, and that this stronger public policy requires that the courts should aid the plaintiff in recovering this money which the defendant is attempting to keep after having obtained it by fraud and false representations."

Defendant's theory is that "plaintiff by his pleadings confessed that he knowingly and wilfully joined with the defendant to procure and did procure by bribe or purchase appointment as a State Highway Maintenance Police Officer of the State of Illinois and illegally paid money to that end. The illegality of the transaction appearing of record upon being brought to the attention of the court required the court to declare the same unenforceable and void."

The sole question presented for our determination is whether plaintiff's statement of claim stated a cause of action and for the purpose of this appeal all the well pleaded allegations of fact in the statement of claim must be assumed to be true.

The gist of plaintiff's claim as set forth in his statement of claim is that the defendant induced him to pay said defendant the money sought to be recovered herein on the false representation that the defendant would pay it to the aforementioned John T. Dempsey and Senator Walker Butler for an illegal purpose and that the defendant is now trying to avoid paying the money back to plaintiff on the ground that he (defendant) obtained the money for an illegal purpose.

Plaintiff contends that "by the great weight of authority the less guilty of two parties to an illegal

now attempting to use as a defense; and also that a much stronger public policy requires that the defendant should not be permitted to retain this money obtained by him through fraud and false representations, and that this stronger public policy requires that the courts should aid the plaintiff in recovering this money which the defendant is attempting to keep after having obtained it by fraud and false representations."

Defendant's theory is that "plaintiff by his pleadings confessed that he knowingly and willfully joined with the defendant to procure and did procure by bribe or purchase appointment as a State Highway Maintenance Police Officer of the State of Illinois and illegally paid money to that end. The illegality of the transaction appearing of record upon being brought to the attention of the court required the court to declare the same unenforceable and void."

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The gist of plaintiff's claim as set forth in his statement of claim is that the defendant induced him to pay said defendant the money sought to be recovered herein on the false representation that the defendant would pay it to the aforementioned John T. Dempsey and Senator Walter Butler for an illegal purpose and that the defendant is now trying to avoid paying the money back to plaintiff on the ground that he (defendant) obtained the money for an illegal purpose.

Plaintiff contends that "by the great weight of authority the less guilty of two parties to an illegal

transaction may recover from the one guilty of greater turpitude the money he paid to the more guilty one, especially if the latter has not paid out such money and has not consummated the illegal transaction" and that "the doctrine that if the parties to an illegal transaction are not in pari delicto and that the less guilty may recover is especially applicable where, although the parties concur in the illegal act, fraud is practiced by one party upon the other so that it appears that the guilt of the latter is subordinate to that of the former."

The general rule is that when two or more persons engage in an unlawful enterprise, or agree to do an illegal act, or one prohibited by public policy, and spend or pay out money to each other or otherwise in aid of some unlawful enterprise, the law will aid neither, and leave them where they place themselves. However, there are exceptions to the general rule permitting one who has been a party to an illegal transaction to recover money paid to another party to such transaction.

In 13 Corpus Juris, sec. 442, it is said at p. 498:

"Where the parties to a contract against public policy or otherwise illegal are not in pari delicto, or equally guilty, which they may not be, and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him. [Citing among other authorities Woodall v. Peden, 274 Ill. 301.] The cases of this character are generally where the party asking to be relieved from the effect of an illegal agreement was induced to enter into the same by means of fraud. Here he is not regarded as being in pari delicto with the other party, and the court may relieve him."

(17 C. J. S., sec. 274 is to the same effect.)

In 12 Am. Juris., sec. 216, the following rule is stated at p. 732:

"As stated above, relief is sometimes given to parties in pari delicto in cases in which the giving of such relief has the effect of discouraging the making of illegal agreements. For a similar reason the courts

transaction may recover from the one guilty of greater fault than the money he paid to the more guilty one, especially if the latter has not paid out such money and has not committed the illegal transaction" and that "the doctrine that if the parties to an illegal transaction are not in pari delicto and that the less guilty may recover is especially applicable where, although the parties consent in the illegal act, fraud is practiced by one party upon the other so that it appears that the guilt of the latter is subordinate to that of the former."

The general rule is that when two or more persons engage in an unlawful enterprise, or agree to do an illegal act, or one prohibited by public policy, and agree or pay out money to each other or otherwise in aid of some unlawful enterprise, the law will aid neither, and leave them where they place themselves. However, there are exceptions to the general rule permitting one who has been a party to an illegal transaction to recover money paid to another party to such transaction.

In 13 Corpus Juris, sec. 447, it is said at p. 490:

"Where the parties to a contract against public policy or otherwise illegal are not in pari delicto, or equally guilty, which they may not be, and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him. [Citing among other authorities Woodhill v. Cohen, 274 Ill. 201.] The cases of this character are generally where the party asking to be relieved from the effect of an illegal agreement was induced to enter into the same by means of fraud, or he is not regarded as being in pari delicto with the other party, and the court may relieve him."

(17 C. J. 2, sec. 274 is to the same effect.)

In 13 Corpus Juris, sec. 447, the following rule is

stated at p. 492:

"As stated above, relief is sometimes given to parties in pari delicto in cases in which the giving of such relief has the effect of discouraging the making of illegal agreements. For a similar reason the courts

allow a party who, though he is in pari delicto, repudiates the agreement while it is executory to recover whatever he has given thereunder, the recovery being, not under the agreement, but in disaffirmance of it, on a promise implied or a right existing independently thereof."

In Woodall v. Peden, 274 Ill. 301, the court said at p. 306:

"If, however, the parties are not in pari delicto, equity may give relief to the one that is comparatively innocent. The court does not so much concern itself with the fortunes of the parties, or either of them, as it does with public policy that such contracts shall not be made and that no one shall take any advantage from the making of them, provided the conduct of either has been such as to receive consideration. The court will allow the remedy, not for the sake of the party who makes the objection but on the grounds of public policy. (Pomeroy's Eq. Jur. Sec. 402-429.)"

In Evans v. Funk, 151 Ill. 650, it was said at p. 657:

"It is true, as a general rule, that when two or more persons engage in an unlawful enterprise, or agree to do an illegal act, or one prohibited by public policy, and spend or pay out money to each other or otherwise in aid of some unlawful enterprise, the law will aid neither, and leave them where they place themselves. But this general rule has its exceptions, arising out of necessity or from unyielding principles of public policy or from the different conditions of the parties. The different degrees of turpitude, immorality or illegality may be so great between different persons engaged in such acts that the general rule will bend to meet the demands of such case and allow a recovery. In Story's Equity Jurisprudence, section 300, it is said that 'in cases where both parties are in delicto, concurring in illegal acts, it does not follow that they are in pari delicto, for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship or undue influence, or great inequality in conditions of age, so that his guilt may be far less in degree than that of his associate in the offense. And, besides, there may be, on the part of the court itself, a necessity of supporting the public interest or public policy in many cases, however reprehensible the acts of the parties may be.'"

"To the same effect are Baehr v. Wolf, 59 Ill. 470; National Bank & Loan Co. v. Petrie, 189 U. S. 423; White v. Franklin Bank, 22 Pick. 181; Tracy v. Talmadge, 14 N. Y. 162; Quirk v. Thomas, 6 Mich. 111.)

It clearly appears from the foregoing authorities that the least guilty of two parties to an illegal transaction, especially where he has been fraudulently induced to become a party to such transaction, may recover what he has paid to

allow a party who, though he is in part delinquent, repudiates the agreement while it is necessary to recover whatever he has given the defendant, the recovery being, not under the agreement, but in discharge of it, on a promise implied or a right existing independently thereof."

In Goodall v. Beland, 274 Ill. 301, the court said at

p. 306:

"If, however, the parties are not in part delinquent, equity may give relief to the one that is comparatively innocent. The court does not so much concern itself with the fortunes of the parties, or either of them, as it does with public policy. And such contracts shall not be made and that no one shall take any advantage from the making of them, provided the contract of either has been such as to receive consideration. The court will allow the remedy not for the sake of the party who makes the objection but on the grounds of public policy. (Homer's Ex. 174, 222. 402-422.)"

In Evans v. Frank, 121 Ill. 650, it was said at p. 657:

"It is true, as a general rule, that when two or more persons engage in an unlawful enterprise, or agree to do an illegal act, or one prohibited by public policy, and spend or pay out money to each other or otherwise in aid of some unlawful enterprise, the law will aid neither, and leave them where they place themselves. But this general rule has its exceptions, arising out of necessity or from any overriding principles of public policy or from the different conditions of the parties. The different degrees of culpability, immorality or illegality may be so great between different persons engaged in such acts that the general rule will bend to meet the demands of such case and allow a recovery. In Torrey's Equity Jurisprudence, section 360, it is said that 'in cases where both parties are in delicto, concerning in illegal acts, it does not follow that they are in part delinquent, for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship or undue influence, or great inequality in conditions of age, so that his guilt may be far less in degree than that of his associate in the offense. And, besides, there may be, on the part of the court itself, a necessity of upholding the public interest or public policy in many cases, however reprehensible the acts of the parties may be.'"

"To the same effect are Baugh v. Wolf, 92 Ill. 470; National Bank & Loan Co. v. Patrick, 189 U. S. 423; White v. Franklin, 22 Pick. 231; Tracy v. T. Langdon, 14 N. Y. 122; Quinn v. Thomas, 6 Mich. 111.)

It clearly appears from the foregoing authorities that the least guilt of two parties to an illegal transaction, especially where he has been fraudulently induced to become a party to such transaction, may recover what he has paid to

the other party to the unlawful enterprise. According to the statement of claim defendant fraudulently induced plaintiff to become a party to the illegal transaction and to pay him \$550 on his representation that it was necessary for him to turn over that amount to the two aforesaid public officials to secure plaintiff a position as a state police officer and plaintiff relied on defendant's false representations but the latter did not consummate the illegal transaction and appropriated the \$550 to his own use.

The statement of claim portrays defendant as a veritable confidence man and surely the law as a matter of necessity in supporting the public interest or public policy will compel a confidence man to return to his victim money obtained from him, even though such victim indicated a willingness that the money paid by him to the confidence man might be used for an illegal purpose. In our opinion the statement of claim alleged every essential element necessary to constitute a good cause of action but we do not agree with plaintiff that the statement of claim presented any question of a confidential relationship or agency.

Defendant relies solely on the general rule applicable to persons who engage in an unlawful enterprise and who are in pari delicto. He makes no attempt in his brief to answer plaintiff's contentions regarding the exceptions to the general rule or the authorities cited in support thereof.

Defendant cites five Illinois cases in support of the general rule but since said rule does not cover a factual situation such as that presented by the statement of claim, it would serve no useful purpose to discuss or distinguish them.

We are impelled to hold that the trial court erred in

the other party to the unlawful enterprise. According to the statement of claim defendant fraudulently induced plaintiff to become a party to the illegal transaction and to pay him \$250 on his representation that it was necessary for him to turn over that amount to the two aforesaid public officials to secure plaintiff a position as a state police officer and plaintiff relied on defendant's false representations but the latter did not consummate the illegal transaction and appropriated the \$250 to his own use.

The statement of claim portrays defendant as a veritable confidence man and says in the law as a matter of necessity in supporting the public interest or public policy will compel a confidence man to return to his victim money obtained from him, even though such victim indicated a willingness that the money paid by him to the confidence man might be used for an illegal purpose. In our opinion the statement of claim alleged every essential element necessary to constitute a good cause of action but we do not agree with plaintiff that the statement of claim presented any question of a confidential relationship or agency.

Defendant relies solely on the general rule applicable to persons who engage in an unlawful enterprise and who are in pari delicto. He makes no attempt in his brief to answer plaintiff's contentions regarding the exceptions to the general rule or the authorities cited in support thereof.

Defendant cites five Illinois cases in support of the general rule but since said rule does not cover a factual situation such as that presented by the statement of claim, it would serve no useful purpose to discuss or distinguish them.

We are impelled to hold that the trial court erred in

sustaining defendant's motion to strike plaintiff's statement of claim and in entering judgment in favor of defendant.

For the reasons stated herein the judgment order of the Municipal court of Chicago, including its order sustaining defendant's motion to strike plaintiff's statement of claim, is reversed and the cause is remanded with directions that defendant be required to file his answer or defense to the statement of claim and that such further proceedings be had as are not inconsistent with this opinion.

JUDGMENT ORDER REVERSED AND
CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

sustaining defendant's motion to strike plaintiff's statement of claim and in entering judgment in favor of defendant.

For the reasons stated herein the judgment order of the Municipal Court of Chicago, including its order sustaining defendant's motion to strike plaintiff's statement of claim, is reversed and the case is remanded with directions that defendant be required to file his answer on defense to the statement of claim and that such further proceedings be had as are not inconsistent with this opinion.

JUDGMENT ORDER REVERSED AND
CASE REMANDED WITH DIRECTIONS.

FRANK, P. J., and SCARLETT, J., concur.

43380

CHARLES MARRON, JR., a minor by
his father and next friend,
CHARLES MARRON, SR.,

Appellee,

v.

THOMAS J. FRIEL and CHARLES C.
RENSHAW, as Trustees, etc., et al.,
doing business as Chicago Surface
Lines, and J. J. McAlleenan,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

328 P.A. 586

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action involving a street car and two automobiles. Plaintiff had verdict and judgment for \$5,000 and defendants appeal.

January 3, 1944, about 4:45 P.M., Peter Cossey, in his Oldsmobile automobile facing east on 63rd Street between Greenwood and Ellis avenues, Chicago, Illinois, sought to make a "U" turn in order to proceed west. A westbound street car operated by McAlleenan collided with the Oldsmobile. Following the collision the Oldsmobile veered southwest and struck another automobile parked at the south curb of 63rd Street. The parked automobile was thrown over the curb and across the sidewalk, pinning plaintiff's minor 8 year old boy against the base of a plate glass window into which the boy was gazing. He was severely injured.

The issues presented to the jury were whether defendants were guilty of failure to keep a proper lookout, careless operation and excessive speed.

Defendants contend there was no proof that they were guilty of negligence which was the proximate cause of plaintiff's injuries. In any event, they say, the verdict is contrary to the manifest weight of the evidence.

CHARLES WARRON, JR., a minor by
his father and next friend,
CHARLES WARRON, SR.,

Appellee,

v.

THOMAS J. FRIEL and CHARLES G.
RENEHAN, as Trustees, etc., et al.,
doing business as Chicago Surplus
Lines, and J. J. McAllenehan,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

328 A. 386

MR. PRESIDING JUSTICE KELLY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action involving a street car

and two automobiles. Plaintiff had verdict and judgment for \$5,000

and defendants appeal.

January 3, 1944, about 4:45 P.M., Peter Goosy, in his

Oldsmobile automobile facing east on 63rd Street between Greenwood

and Ellis avenues, Chicago, Illinois, sought to make a "U" turn

in order to proceed west. A westbound street car operated by

McAllenehan collided with the Oldsmobile. Following the collision

the Oldsmobile veered southwest and struck another automobile

parked at the south curb of 63rd Street. The parked automobile

was thrown over the curb and across the sidewalk, spinning plain-

tiff's minor 8 year old boy against the base of a plate glass

window into which the boy was gazing. He was severely injured.

The issues presented to the jury were whether defendants

were guilty of failure to keep a proper lookout, careless operation

and excessive speed.

Defendants contend there was no proof that they were

guilty of negligence which was the proximate cause of plaintiff's

injuries. In any event, they say, the verdict is contrary to

the manifest weight of the evidence.

Plaintiff did not sue Cosey. The question of Cosey's negligence is not involved.

We shall consider first the question of law whether the case should have gone to the jury. The testimony most favorable to plaintiff is that before commencing the "U" turn, Cosey and his wife looked both ways on 63rd Street and saw no traffic either way for a couple of blocks; that the pavement was dry and the day fairly light; that at the time of the collision the Oldsmobile had completed the turn, was facing and proceeding west from 5 to 7 miles an hour, in second speed; that the Oldsmobile was struck by a street car, moving west about 20 miles an hour, which did not slacken speed before the impact; that McAleenan did not see the peril as soon as his passengers because his attention was diverted to the "right"; and that the Oldsmobile, out of Cosey's control, swerved southwest to complete the course described in our statement of facts. We believe that evidence tends to prove negligence on the part of the defendants.

The question of proximate cause must be answered by the determination of what the motorman, as a prudent man, should have foreseen as the probable consequences of his conduct. In our determination we again take the evidence and inferences favorable to plaintiff at the close of the evidence.

Sixty-third street is a 45 or 50 foot business street carrying two street car tracks. The south curb is 25 feet from the westbound tracks. The Rapid Transit Elevated structure is overhead. At the time of the accident, both sides of the street were parked solidly with automobiles. Most of the stores were open for business. McAleenan had been on the route for several months. Should he have foreseen that, driving a street car at 20 miles an hour, under the conditions noted, his attention

Plaintiff did not sue Casey. The question of Casey's

negligence is not involved.

We shall consider first the question of law whether the

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to plaintiff is that before commencing the "U" turn, Casey and

his wife looked both ways on 63rd Street and saw no traffic either way for a couple of blocks; that the pavement was dry and the day

fairly light; that at the time of the collision the Oldsmobile had

completed the turn, was facing and proceeding west from S to Y

miles an hour, in second gear; that the Oldsmobile was struck by

a street car, moving west about 20 miles an hour, which did not

slacken speed before the impact; that McAllenen did not see the

car until as soon as his passengers because his attention was diverted

to the "right"; and that the Oldsmobile, out of Casey's control,

swerved southwest to complete the course described in our statement

of facts. We believe that evidence tends to prove negligence on

the part of the defendants.

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open for business. McAllenen had been on the route for several

months. Should he have foreseen that, driving a street car at

20 miles an hour, under the conditions noted, his attention

diverted to the right and without slackening speed, he would collide with the Oldsmobile proceeding west at a slow speed ahead of his street car, so as to cause Cosey to lose control over it and the Oldsmobile to swerve southwest 25 feet at increasing speed to the south curb, there to collide with a parked automobile and force it over the curb and across the sidewalk? We think reasonable men would disagree in their answer to this question. We, accordingly, believe the question was for the jury.

We turn now to the question whether the jury's finding that defendants were guilty of actionable negligence was against the manifest weight of the evidence.

Cosey testified the Oldsmobile was in good mechanical condition; that he had been facing west, going from 5 to 7 miles an hour for a few seconds and had proceeded due west about 12 or 15 feet before being struck; that he looked both ways before commencing the "U" turn and for three or four blocks saw nothing; that he made the "U" turn in second speed and, when struck, the left wheel of his automobile was between the east and westbound tracks and was headed directly west; that he lost control of the car and, having been thrown forward, his head was injured and his hands were knocked off the steering wheel; that he did not put his foot on the accelerator, but did not have presence of mind sufficient to apply the brakes and the speed of the Oldsmobile increased; that he tried to keep from running his automobile up on the sidewalk and did not have time to stop the forward motion; and that by the time he got both hands on the steering wheel, the car had stopped against the building before he realized what had happened.

Cosey's wife, sitting in the rear of the automobile, said she saw no street cars for three blocks either way; that the Oldsmobile, when struck, had been facing and proceeding due west

diverted to the right and without slackening speed, he would collide with the Oldsmobile proceeding west at a slow speed ahead of his street car, so as to cause Gosey to lose control over it and the Oldsmobile to swerve southwest 25 feet at increasing speed to the south curb, there to collide with a parked automobile and force it over the curb and across the sidewalk? We think reasonable men would disagree in their answer to this question. We, accordingly, believe the question was for the jury. We turn now to the question whether the jury's finding that defendants were guilty of actionable negligence was against the manifest weight of the evidence.

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Gosey's wife, sitting in the rear of the automobile, said she saw no street cars for three blocks either way; that the Oldsmobile, when struck, had been facing and proceeding due west

for a few seconds; and that the impact was "terrible" and she felt a "terrible jolt" which "dazed" her and threw her against the front seat.

Nelson testified that he was walking west on the south side of 63rd street; that when he first saw the Oldsmobile it was facing west on the north side of the westbound tracks, moving about 9 miles an hour; that the street car was at the time about 40 feet away, going about 15 miles per hour; that the street car did not change its speed before the collision; that the street car moved 5 to 8 feet after the collision; that the Oldsmobile picked up speed and was going, maybe 15 miles an hour, when it struck the second car; and that he saw no eastbound street car during the incident. Referred to a statement signed by him for the Street Car Company's representative, he said he had never read it and that he did not tell that representative that the street car was going 12 miles an hour; that he said nothing about seeing an eastbound street car, but remembered saying that it pulled in front of the car so suddenly the motorman did not have a chance to stop; and did not say previously that the street car moved only one or two feet after impact.

Two police officers testified to the condition of the car, one said a dent just above the tail light on the right rear of the Oldsmobile was the only damage. He said it was dark at the time of his inspection and that he did not recall that the tail light was broken. The other officer testified that the right rear side of the back of the Oldsmobile was smashed, completely pushed in and the tail light broken.

McAleenan testified he had been working for the Surface Lines about 10 months, and 6 months on 63rd Street, when the accident

for a few seconds; and that the impact was "terrible" and she felt a "terrible jolt" which "dazed" her and threw her against the front seat.

Nelson testified that he was walking west on the south side of 63rd street; that when he first saw the Oldsmobile it was facing west on the north side of the westbound tracks, moving about 2 miles an hour; that the street car was at the time about 40 feet away, going about 15 miles per hour; that the street car did not change its speed before the collision; that the street car moved 5 to 6 feet after the collision; that the Oldsmobile picked up speed and was going, maybe 15 miles an hour, when it struck the second car; and that he saw no eastbound street car during the incident. Referred to a statement signed by him for the Street Car Company's representative, he said he had never read it and that he did not tell that representative that the street car was going 15 miles an hour; that he said nothing about seeing an eastbound street car, but remembered saying that it pulled in front of the car as suddenly the motorman did not have a chance to stop; and did not say previously that the street car moved only one or two feet after impact.

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McAlister testified he had been working for the Union Lines about 10 months, and 6 months on 63rd Street, when the accident

occurred. He left its employ in March, 1944. He was familiar with the scene of the accident. Proceeding west he had stopped at Greenwood Avenue, a short block east of Ellis Avenue and had gone a half block west when the accident occurred. He testified his car was going 12 or 15 miles an hour and an eastbound street car which obstructed his vision to the west passed him; that the Oldsmobile, making a "U" turn, came into his vision when 15 feet away; that he reduced his speed to 5 miles an hour before the collision; that the Oldsmobile was going "pretty slow", slower than the street car and was struck a solid blow; that its speed was increased after the impact; and that he had used everything possible to stop the street car and after the impact stopped in about 4 feet. He further testified that he was going 15 miles an hour and that it might take 30 feet to stop the street car at that speed.

Witness Wilson was riding on the front platform of the street car. He said the Oldsmobile made a "U" turn from behind the eastbound car and when he saw it it was about 15 feet in front of the street car going west; that the back wheels of the Oldsmobile were in the westbound tracks when the accident occurred and at the impact its speed was increased; that the motorman did everything he could to stop but there was no way "in the world" to avoid the accident, and that the impact bent the body of the Oldsmobile out of shape and "caved" it in; that he heard another passenger say "Stop it!"; and it was after that the motorman applied the brakes.

Witness Tolmie said the Oldsmobile made a "U" turn directly behind the eastbound street car into the path of the westbound street car; that its front wheels had entered the westbound track when the street car was 15 feet away and, by the time the motorman got control, it was 12 feet away; that the Oldsmobile was

occurred. He left its employ in March, 1944. He was familiar with the scene of the accident. Proceeding west he had stopped at Greenwood Avenue, a short block east of Ellis Avenue and had gone a half block west when the accident occurred. He testified his car was going 15 or 16 miles an hour and an eastbound street car which obstructed his vision to the west passed him; that the Oldsmobile, making a "U" turn, came into his vision when 15 feet away; that he reduced his speed to 5 miles an hour before the collision; that the Oldsmobile was going "pretty slow", slower than the street car and was struck a solid blow; that its speed was increased after the impact; and that he had used everything possible to stop the street car and after the impact stopped in about 4 feet. He further testified that he was going 15 miles an hour and that it might take 30 feet to stop the street car at that speed.

Witness Wilson was riding on the front platform of the street car. He said the Oldsmobile made a "U" turn from behind the eastbound car and when he saw it it was about 15 feet in front of the street car going west; that the back wheels of the Oldsmobile were in the westbound tracks when the accident occurred and at the impact its speed was increased; that the motorman did everything he could to stop but there was no way "in the world" to avoid the accident, and that the impact bent the body of the Oldsmobile out of shape and "caved" it in; that he heard another passenger say "Stop it!"; and it was after that the motorman applied the brakes.

Witness Tolmie said the Oldsmobile made a "U" turn directly behind the eastbound street car into the path of the westbound street car; that its front wheels had entered the westbound track when the street car was 15 feet away and, by the time the motorman got control, it was 12 feet away; that the Oldsmobile was

smashed in very little at the rear; that he saw the Oldsmobile before the motorman and told the motorman to stop the car and the latter immediately applied the brakes; that when he called the motorman had his head turned slightly toward the right, watching an automobile which was coming from a garage on the north side of the street; that it was not until he shouted that the motorman applied the brakes; that the street car went about 10 feet after the collision; and that the impact caused the driver to lose control and gave the Oldsmobile more momentum. The witness admitted that a couple of weeks after the accident he stated that the front of the street car was 30 feet from the Oldsmobile when he first saw it and at that time the motorman was looking toward the right.

Witness Daniel testified that as the westbound street car was passing an eastbound car, the Oldsmobile made a "U" turn; that when he first saw it it was 15 or 18 feet away with its front wheels on the westbound track; that he did not hear anyone shout to the motorman, but he heard him make an exclamation and try to stop; that the street car was going between 15 and 20 miles an hour and "caught" the automobile; and that "perhaps" the impact caused its speed to increase.

The statement signed by Nelson was introduced in evidence. According to it Nelson stated that the street car was moving about 12 miles an hour and, after the impact, moved only one or two feet and that the Oldsmobile was behind an eastbound street car and pulled in front of the westbound car.

The questions of the credibility of the witnesses Nelson and Tolmie, whom counsel sought to impeach, were for the jury.

Whether the accident was attributable to Cosey's sudden turn from behind an eastbound street car, or to the motorman's failure to keep a proper lookout or observe reasonable speed under

crushed in very little at the rear; that he saw the Oldsmobile before the motorist and told the motorist to stop the car and the latter immediately applied the brakes; that when he called the motorist had his head turned slightly toward the right, watching an automobile which was coming from a garage on the north side of the street; that it was not until he shouted that the motorist applied the brakes; that the street car went about 10 feet after the collision; and that the impact caused the driver to lose control and gave the Oldsmobile more momentum. The witness admitted that a couple of weeks after the accident he stated that the front of the street car was 30 feet from the Oldsmobile when he first saw it and at that time the motorist was looking toward the right.

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The statement signed by Nelson was introduced in evidence. According to it Nelson stated that the street car was moving about 15 miles an hour and, after the impact, moved only one or two feet and that the Oldsmobile was behind an eastbound street car and pulled in front of the westbound car.

The question of the credibility of the witnesses Nelson and Tolmie, whom counsel sought to impeach, were for the jury.

Whether the accident was attributable to Goosy's sudden

turn from behind an eastbound street car, or to the motorist's failure to keep a proper lookout or observe reasonable speed under

the circumstances or act properly after he had notice, or both, was a question for the jury. If the motorman was negligent in any degree, it is enough to sustain the verdict if the negligence was the proximate cause of plaintiff's injuries. The jury resolved the questions in favor of the plaintiff.

The Coseys testified that before commencing the turn they looked both ways and could see two or three blocks and saw no street car either way. Defendants say that no reasonable mind can accept this testimony as true. The jury may have disregarded this extreme testimony. It was not required to completely disregard all of the Coseys' testimony on that account.

There is no contention that Cosey had no right to make a "U" turn, or that he could not cross defendants' tracks for that purpose. The right of the Surface Lines in its tracks is not absolutely paramount.

Speed of 20 miles an hour for a street car is not negligence per se. It is plaintiff's point that 20 miles an hour while looking away, when he should have been applying brakes, is negligence. The jury may have believed the motorman should have seen the Oldsmobile before he did and that, had he done so, he could, with ordinary care have avoided the accident. It is no defense to say that he did everything he could to avoid the accident after he observed the peril, when the charge is that he should have observed the peril sooner.

We think it was for the jury to say whether the motorman used ordinary care in diverting his attention to the possible danger on the right, while going 20 miles per hour on 63rd Street between Greenwood and Ellis Avenues under the circumstances. Defendant says the motorman did not divert his full attention. There can be little doubt from the evidence that the motorman did not

the circumstances or not properly after he had notice, or both, was a question for the jury. If the motorman was negligent in any degree, it is enough to sustain the verdict if the negligence was the proximate cause of plaintiff's injuries. The jury reserved the questions in favor of the plaintiff.

The Goseys testified that before commencing the turn they looked both ways and could see two or three blocks and saw no street car either way. Defendants say that no reasonable mind can accept this testimony as true. The jury may have disregarded this extreme testimony. It was not required to completely disregard all of the Goseys' testimony on that account.

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Speed of 20 miles an hour for a street car is not negligence per se. It is plaintiff's point that 20 miles an hour while looking away, when he should have been applying brakes, is negligence. The jury may have believed the motorman should have seen the Oldsmobile before he did and that, had he done so, he could, with ordinary care have avoided the accident. It is no defense to say that he did everything he could to avoid the accident after he observed the peril, when the charge is that he should have observed the peril sooner.

We think it was for the jury to say whether the motorman used ordinary care in diverting his attention to the possible danger on the right, while going 20 miles per hour on 63rd Street between Greenwood and Ellis Avenues under the circumstances. Defendant says the motorman did not divert his full attention. There can be little doubt from the evidence that the motorman did not

see Cosey's car until a passenger called his attention to it.

We cannot say that the verdict is clearly against the manifestweight of the evidence and for that reason and the further reasons hereinabove set forth, the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE AND DURKE, JJ. CONCUR.

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We cannot say that the verdict is clearly against the

manifest weight of the evidence and for that reason and the further

reasons hereinabove set forth, the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWIS AND CLARK, JJ. CONCUR.

43483

CLARE J. MURPHY, Conservator of
the Estate of MAX PASHKOW,
Incompetent,

Appellee,

v.

THOMAS J. FRIEL and CHARLES C.
RENSHAW, as Trustee, etc., et al
doing business as CHICAGO SURFACE
LINES,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

3231A. 586²

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action arising out of the same accident as that in Marron v. Friel, et al, Appellate Court No. 43380. The jury returned a verdict for plaintiff for \$75,000. Defendants made a motion for a new trial, which was denied upon plaintiff remitting \$40,000. Judgment was for \$35,000 and defendants appeal.

The accident occurred January 3, 1944, about 4:45 P.M. Peter Cossey's Oldsmobile facing east on 63rd Street between Greenwood and Ellis Avenues, Chicago, Illinois, sought to make a "U" turn in order to proceed west on 63rd Street. A westbound street car operated by Defendant McAlenenan collided with the Oldsmobile which veered southwest and struck an automobile parked at the south curb of 63rd Street. The parked automobile was thrown over the curb and across the sidewalk injuring Charles Marron, Jr. Cossey's automobile then climbed the curb, crossed the sidewalk and pinned Max Pashkow an incompetent person, against the building. This suit was begun in his name but a conservator was substituted for him as plaintiff.

43483

GLASS J. MURPHY, Conservator of
the Estate of MAX BASHKOW,
Incompetent,

Appellee,

v.

THOMAS J. FRIEL and CHARLES C.
WINSTON, as Trustees, et al
doing business as CHICAGO RUTHER
LINES,

Appellants.

SUPREME COURT

COOK COUNTY.

APPEAL FROM

33014586

THE PRESIDING JUSTICE KIRBY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action arising out of the same

accident as that in Marron v. Friel, et al, Appellate Court No.

43380. The jury returned a verdict for plaintiff for \$5,000.

Defendants made a motion for a new trial, which was denied upon

plaintiff remitting \$40,000. Judgment was for \$5,000 and defendants

appeal.

The accident occurred January 5, 1944, about 4:45 P. M.

Peter Gasey's Oldsmobile facing east on 63rd Street between

Greenwood and Ellis Avenues, Chicago, Illinois, sought to make a

left turn in order to proceed west on 63rd Street. A westbound

street car operated by defendant defendant collided with the

Oldsmobile which veered southwest and struck an automobile parked

at the south curb of 63rd Street. The parked automobile was thrown

over the curb and across the sidewalk injuring Charles Marron, Jr.

Gasey's automobile then climbed the curb, crossed the sidewalk

and pinned Max Bashkow an incompetent person, against the building.

This suit was begun in his name but a conservator was substituted

for him as plaintiff.

The defendants contend that there was no evidence tending to prove that they were negligent under the circumstances or that, should we find against that contention, plaintiff's injury was proximately caused by their negligence.

The circumstances of this case are substantially the same as that in the Marron case. The evidence and inferences here are at least as favorable to plaintiff as in that case. Since we have held there that the questions of defendants' negligence and proximate cause were for the jury we must, accordingly, so hold in this case.

Defendants also contend that the verdict of \$75,000 was so grossly excessive as to be accounted for only by prejudice, passion or a misconception of the evidence. Plaintiff says this question was not raised in the trial court. In their motion for a new trial defendants pointed to the verdict as being excessive, and claimed that the jury was prejudiced. They say that they asked for a new trial, not a remittitur, and that this is still their position.

Pashkow was an incompetent person at the time of the trial. His mental condition is not chargeable to the accident. He testified briefly, as did another person in his behalf, that he had not worked regularly for about 20 years, but had done odd jobs.

After the accident Pashkow's left leg looked like "a corkscrew". He was taken to a hospital where x-rays were taken of his leg. The x-ray service does not appear to have been very thorough. From the x-rays it would appear the injured leg was placed in a metal cast. Outside of these x-rays there is no evidence of any treatment until Pashkow entered the Veterans Hospital at Downey, Illinois, in August as a mental patient. Though in a mental ward, he was given physiotherapy treatment for his leg.

The defendants contend that there was no evidence tending to prove that they were negligent under the circumstances or that, should we find against them in contention, Plaintiff's injury was proximately caused by their negligence.

The circumstances of this case are substantially the same as that in the Marston case. The evidence and inferences here are at least as favorable to Plaintiff as in that case. Since we have held there that the questions of defendants' negligence and proximate cause were for the jury we must, accordingly, so hold in this case.

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Pashkow was an incompetent person at the time of the trial. His mental condition is not chargeable to the accident. He testified briefly, as did another person in his behalf, that he had not worked regularly for about 20 years, but had done odd jobs. After the accident Pashkow's left leg looked like a "cockscrow". He was taken to a hospital where x-rays were taken of his leg. The x-ray service does not appear to have been very thorough. From the x-rays it would appear the injured leg was placed in a metal cast. Outside of these x-rays there is no evidence of any treatment until Pashkow entered the Veterans Hospital at Downey, Illinois, in August as a mental patient. Though in a mental ward, he was given physiotherapy treatment for his leg.

The only effect seemed to be that he was made more comfortable. He was in a wheel chair from the time of his entrance into the Veterans Hospital.

Pre-trial examinations showed that Pashkow's left hip, thigh and leg were abnormal; that the left leg between the hip and knee was 4 inches shorter than the right; that the left thigh was 3 inches larger than the right; that the circumference of the left leg below the knee was 1 inch less than the right; that the left hip and knee were limited in motion; that the nerves and blood vessels had been injured resulting in a cold, clammy feeling and a purplish color of the flesh; that the left knee bends in an incorrect axis; that the left foot is in a dropped condition from non-use and non-support; and that the left leg could bear no weight. The x-rays taken after the accident showed comminuted fractures of the left femur and tibia; fracture of the fibula with displaced bone fragments; the fractures of the tibia running into the kneecap; and an injury to the knee. Pre-trial x-rays showed that these fractures had healed improperly. There was malunion and non-union of the fragments, and overriding which induced masses of calcium, causing deformation. The three medical experts offered by plaintiff gave their opinion that the injured leg should be amputated at midthigh. No medical testimony was presented by the defendants.

There is no merit to defendants' contention that the evidence is uncertain on the question whether all of Pashkow's fractures were suffered in the accident. There was evidence that he was in good health before the accident. The pre-trial x-rays do not show new injuries. They show developments in the same injuries pictured after the accident. The one fracture not shown after the accident, shows as an old fracture in the pre-trial x-rays.

The accident occurred in January, 1944. Pashkow was

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clammy feeling and a purplish color of the flesh; that the left

knee bends in an incorrect axis; that the left foot is in a

dropped condition from non-use and non-support; and that the left

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was presented by the defendants.

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x-rays do not show new injuries. They show developments in the

same injuries pictured after the accident. The one fracture not

shown after the accident, shows an old fracture in the pre-trial

x-rays.

The accident occurred in January, 1944. Pashkow was

admitted to the Veterans Hospital at Downey, Illinois in August. Defendants contend there was no proof of any treatment for the injury during this period. A person who is injured by the tortious conduct of another must use reasonable care and diligence to minimize the damage and can only recover such damages as he could not have avoided by the exercise of reasonable diligence. Cedar Rapids & Iowa City Ry. and Light Co. v. Sprague Electric Co., 280 Ill. 386.

Defendants point to the lack of evidence that Pashkow received proper medical treatment. They say he was admitted to the Veterans Hospital as a mental patient. This is to support their contention that the condition of the leg was neglected. Pashkow was discharged from the army in November 1942 because of a mental ailment, after 2½ months service. He entered the Veterans Hospital suffering from dementia praecox, simple type.

Insane persons are liable for torts they commit. McIntyre v. Sholty, 121 Ill. 660. We are justified in concluding from C. & A. R. R. Co. v. Becker, 76 Ill. 25, and 38 Am. Jur. p. 882, that the question of their discretion, in determining contributory negligence, is for the jury in each case. There is no case cited nor found deciding responsibility of insane persons to avoid aggravation or neglect of an injury. In an intentional wrong a person of low intelligence may recover damages due to the aggravated condition. Restatement of the Law of Torts, Sec. 918, Chap. 47. Illustration 4. We believe we should apply the same rule in determining responsibility for avoidable consequences as is applied in determining contributory negligence of insane persons.

Plaintiff's case included the inference, at least, that Pashkow was suffering from dementia praecox at the time of the accident. This is enough to take to the jury the question whether he possessed discretion sufficient to avoid neglecting his injury, and to what extent. The defendants should have gone on from there.

The only item of expense testified to was the future amputation which plaintiff's medical witness said was necessary. Plaintiff argues that a person who has a sound mind, though physically

admitted to the Veterans Hospital at Downy, Illinois in August. Defendants contend there was no proof of any treatment for the injury during this period. A person who is injured by the tortious conduct of another must use reasonable care and diligence to minimize the damage and can only recover such damages as he could not have avoided by the exercise of reasonable diligence. Cedar Rapids & Iowa City Ry. and Light Co. v. Spence Electric Co., 280 Ill. 322.

Defendants point to the lack of evidence that Paszkow received proper medical treatment. They say he was admitted to the Veterans Hospital as a mental patient. This is to support their contention that the condition of the leg was neglected. Paszkow was discharged from the army in November 1942 because of a mental ailment, after 2 1/2 months service. He entered the Veterans Hospital suffering from dementia praecox, simple type.

In sane persons are liable for torts they commit. McIntyre v. Pholty, 121 Ill. 620. We are justified in concluding from C. & A. R. Co. v. Becker, 78 Ill. 25, and 38 Am. Jur. p. 282, that the question of their discretion, in determining contributory negligence, is for the jury in each case. There is no case cited nor found deciding responsibility of insane persons to avoid aggravation or neglect of an injury. In an intentional wrong a person of low intelligence may recover damages due to the aggravated condition. Restatement of the Law of Torts, Sec. 918, Chap. 47. Illustration 4. We believe we should apply the same rule in determining responsibility for avoidable consequences as is applied in determining contributory

negligence of insane persons. Plaintiff's case included the inference, at least, that Paszkow was suffering from dementia praecox at the time of the accident. This is enough to take to the jury the question whether he possessed discretion sufficient to avoid neglecting his injury, and to what extent. The defendants should have gone on from there. The only item of expense testified to was the future reputation which plaintiff's medical witness said was necessary.

incapacitated, might do work requiring only mental effort. He says Pashkow, however, has not that mental capacity and is, therefore, worse off. Defendants say that plaintiff did not ask for special damages and, that any damages claimed on account of his limited abilities, were special, and no claim was made in the complaint for special damages. We disagree. We think plaintiff's argument is directed to support the claim of lost earning power which the complaint is sufficiently broad to recover.

To sustain the judgment of \$35,000 plaintiff points to the reduced purchasing power of money. The question we are considering is whether the case must be retried because of excessiveness of the verdict. Plaintiff by making a remittitur of \$40,000 conceded that the verdict was excessive to that extent.

There is no claim that there was any prejudicial conduct during the trial which would have aroused sympathy or bias in the minds of the jurors. Defendants do contend that Pashkow, sat in a wheel chair with his deformed and useless left leg dangling in a "dropped foot" position which was bound to prejudice their case. They say that had Pashkow been properly treated after the accident, or had amputation been performed before the trial, the jury would not have had the image of him that they had at the trial. We are of the opinion that this is a case in which we must consider the question of the excessiveness of the verdict free from considerations of unfairness in the trial.

It has frequently been held that, where the trial has been fair and impartial, mere excess of allowance in damages may be cured by a remittitur. Wabash Railroad Co. v. Billings, 212 Ill. 37. When a verdict, however, is so flagrantly excessive as to be accounted for only on the grounds of prejudice, passion or misconception, the remittitur does not remove those improper elements.

incapacitated, might do work requiring only mental effort. He says Pashkow, however, has not that mental capacity and is, therefore, worse off. Defendants say that plaintiff did not ask for special damages and, that any damages claimed on account of his limited abilities, were special, and no claim was made in the complaint for special damages. We disagree. We think plaintiff's argument is directed to support the claim of lost earning power which the complaint is sufficiently broad to cover.

To sustain the judgment of \$5,000 plaintiff points to the reduced purchasing power of money. The question we are considering is whether the case must be retried because of excessiveness of the verdict. Plaintiff by making a remittitur of \$40,000 conceded that the verdict was excessive to that extent.

There is no claim that there was any prejudicial conduct during the trial which would have aroused sympathy or bias in the minds of the jurors. Defendants do contend that Pashkow, sat in a wheel chair with his deformed and mangled left leg dangling in a "dropped foot" position which was bound to prejudice their case. They say that had Pashkow been properly treated after the accident, or had amputation been performed before the trial, the jury would not have had the image of him that they had at the trial. We are of the opinion that this is a case in which we must consider the question of the excessiveness of the verdict free from considerations of unfairness in the trial.

It has frequently been held that, where the trial has been fair and impartial, mere excess of allowance in damages may be cured by a remittitur. Wabash Railroad Co. v. Billings, 218 Ill. 37. When a verdict, however, is so flagrantly excessive as to be accounted for only on the grounds of prejudice, passion or misconception, the remittitur does not remove those improper elements.

Lowenthal v. Streng, 90 Ill. 74. Cases have been cited by both parties where remittiturs have been approved and disapproved. We need not refer to any of those cases.

We believe the verdict of \$75,000 is so excessive that it cannot be accounted for except on prejudice, passion or misconception. The remittitur did not remove these improper elements, so as to give assurance that defendants had a fair trial. We see no merit in plaintiff's contention that crucial facts in the Marron case and in this case are the same and we should consider the question of defendants' liability as settled by two juries. We believe that the defendants are entitled to another trial. This conclusion may, at first, seem harsh. It must be kept in mind that the jury had to decide whether defendants' negligence was the proximate cause of Pashkow's injuries. This required consideration of Cosey's conduct. If the jury was prejudiced in favor of Pashkow, defendants might well suffer an injustice on the question of liability.

Since the case must be retried, we believe we should pass on two remaining points:

Defendants rely upon Chicago City Railway v. Henry, 218 Ill. 92 to support their claim that the trial court committed error in permitting a medical witness to testify to the cost of amputation where there was no evidence that such was required or that there was an intention of having it performed. In the Henry case there was no evidence that the operation was not contemplated or required. In the case before us medical testimony was that the amputation should be performed, that surgery is "indicated." We think there was enough in the evidence to justify the estimate of the cost of the amputation. Moreover, the amount of \$500 is an insignificant part of the verdict.

Lowenthal v. Brown, 60 Ill. 74. Cases have been cited by both parties where remittitures have been approved and disapproved. We need not refer to any of those cases.

We believe the verdict of \$75,000 is an excessive that it cannot be accounted for except on prejudice, passion or misconception. The remittitur did not remove these improper elements, so as to give assurance that defendants had a fair trial. We see no merit in Plaintiff's contention that crucial facts in the Marxson case and in this case are the same and we should consider the question of defendants' liability as settled by two juries. We believe that the defendants are entitled to another trial. This conclusion may, at first, seem harsh. It must be kept in mind that the jury had to decide whether defendants' negligence was the proximate cause of Pashkow's injuries. This required consideration of Gossy's conduct. If the jury was prejudiced in favor of Pashkow, defendants might well suffer an injustice on the question of liability. Since this case must be retried, we believe we should pass

on two remaining points:

Defendants rely upon Chicago City Railway v. Henry, 218 Ill. 62 to support their claim that the trial court committed error in permitting a medical witness to testify to the cost of amputation where there was no evidence that such was required or that there was an intention of having it performed. In the Henry case there was no evidence that the operation was not contemplated or required. In the case before us medical testimony was that the amputation should be performed, that surgery is "indicated." We think there was enough evidence to justify the estimate of the cost of the amputation. Moreover, the amount of \$500 is an insignificant part of the verdict.

Complaint is made to the giving of plaintiff's instruction No. 27. We think that the instruction was proper.

On a retrial the jury should be instructed on defendants' theory, if it is then their theory, that they should be charged with only such damages as were proximately caused by their negligence, if any, as shown by a preponderance of the evidence. This should be consistent, however, with our views hereinbefore stated. We think that defendants' instruction No. 30 was properly refused since it assumes that Cosey failed to exercise care to control his Oldsmobile after the first collision.

For the reasons given the judgment is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

LEWE AND BURKE, JJ. CONCUR.

Complaint is made to the giving of plaintiff's instruction

No. 27. We think that the instruction was proper.

On a retrial the jury should be instructed on defendants'

theory, if it is then their theory, that they should be charged with only such damages as were proximately caused by their negligence,

if any, as shown by a preponderance of the evidence. This

should be consistent, however, with our views heretofore stated.

We think that defendants' instruction No. 30 was properly refused

since it assumes that Casey failed to exercise care to control

his Oldsmobile after the first collision.

For the reasons given the judgment is reversed and the

cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

LEWIS AND BUNKER, JJ. CONCUR.

43514

JAMES OAKLEY KOONTZ,

Appellant,

v.

PUBLIC SERVICE COMPANY OF NORTHERN
ILLINOIS, a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

328 I.A. 387

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for harm which plaintiff claims he and his family suffered because defendant unlawfully discontinued service of gas and electricity in his home. The court without a jury found against plaintiff and judgment was for defendant's costs. Plaintiff has appealed.

Plaintiff in the summer of 1938 lived in Calumet City, where defendant is in the utility business. It had furnished gas and electricity in the plaintiff's 10 room home for 20 years. On July 13, 1938, plaintiff, in financial difficulties, filed a petition in bankruptcy in the United States District Court. He listed a debt of \$10 to defendant. This was an arrearage which had accumulated the previous few months. On August 12 defendant discontinued its service. On September 29, 1938, pursuant to a deposit by plaintiff of \$12.50 the service was restored. Plaintiff and his family were deprived of gas and electricity and were forced to buy meals outside their home during the period of discontinued service. They had no light, hot water or radio during that time.

The issues are whether defendant's action was a coercive measure to force payment of plaintiff's past due bill; whether the cash deposit required by defendant to restore the service was unreasonable; and whether requisite notice was given plaintiff before the service was discontinued.

JAMES CARMY KNOTT,

Appellant,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO,

PUBLIC SERVICE COMPANY OF NORTHERN
ILLINOIS, a corporation,

Appellee.

32314-587

MR. PRESIDING JUSTICE KELLY DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for harm which

plaintiff claims he and his family suffered because defendant unlawfully discontinued service of gas and electricity in his

home. The court without a jury found against plaintiff and

judgment was for defendant's costs. Plaintiff has appealed.

Plaintiff in the summer of 1938 lived in Chicago City,

where defendant is in the utility business. It had furnished

gas and electricity in the plaintiff's 10 room home for 20 years.

On July 13, 1938, plaintiff, in financial difficulties, filed a

petition in bankruptcy in the United States District Court. He

listed a debt of 10 to defendant. This was an error which

had accumulated the previous few months. On August 12 defendant

discontinued its service. On September 29, 1938, pursuant to a

deposit by plaintiff of \$2.50 the service was restored. Plaintiff

and his family were deprived of gas and electricity and were

forced to buy meals outside their home during the period of dis-

continued service. They had no light, hot water or radio during

that time.

The issues are whether defendant's action was a coercive

measure to force payment of plaintiff's past due bill; whether the

cash deposit required by defendant to restore the service was un-

reasonable; and whether requisite notice was given plaintiff

before the service was discontinued.

On August 29, 1938 defendant sent plaintiff a final bill for the services furnished between July 14th and August 12th. This bill showed charges for that period of \$2.42. It contained also a charge for previous service for \$12.72 and stated a total amount due of \$15.14. The two larger figures have red ink lines drawn through them. The bill is stamped with a receipt for \$2.42, "on account."

Plaintiff testified that after the service was discontinued a girl employee of defendant demanded that he pay the \$10 arrearage and put up a deposit of \$25 before restoring the service. After the service was disconnected plaintiff sought, without success, the intervention of the United States District Court. He then turned to the Illinois Commerce Commission to complain of the demand for the cash deposit. It is clear from the testimony that he did not then complain that defendant was attempting to coerce him into payment of the debt he had listed in his bankruptcy petition. He testified that when he made the payment of the aforementioned bill he tendered the amount paid, telling the cashier that the balance had been taken care of in the bankruptcy; and that he did not remember that she demanded payment of the entire bill.

The Illinois Commerce Commission, General Order No. 109 governing establishment of credits, etc., and defendant's schedules No. 2 and No. G-6 Terms and Conditions for Application for Service are in the record. The general order provides that where a consumer has been delinquent three or more times within the preceding twelve billing periods the Utility may require a cash deposit to establish a credit. Plaintiff contends that defendant demanded a \$25 deposit for restoration of the service and that in any event the \$12.50 exceeded the amount which defendant was entitled to

On August 29, 1938 defendant sent plaintiff a final bill

for the services furnished between July 14th and August 12th.

This bill showed charges for that period of \$2.42. It contained also a charge for previous service for \$2.73 and stated a total amount due of \$5.14. The two larger figures have red ink lines drawn through them. The bill is stamped with a receipt for \$2.42,

"on account."

Plaintiff testified that after the service was discon-

tinued a girl employee of defendant demanded that they pay the \$10 arrears and put up a deposit of \$5 before restoring the service.

After the service was disconnected plaintiff sought, without

success, the intervention of the United States District Court.

He then turned to the Illinois Commerce Commission to complain of the demand for the cash deposit. It is clear from the testimony

that he did not then complain that defendant was attempting to

coerce him into payment of the debt he had listed in his bankruptcy

petition. He testified that when he made the payment of the

forementioned bill he tendered the amount paid, telling the cashier

that the balance had been taken care of in the bankruptcy; and

that he did not remember that she demanded payment of the entire bill.

The Illinois Commerce Commission, General Order No. 109

Governing establishment of credits, etc., and defendant's schedules

No. 2 and No. 6 Terms and Conditions for Application for Service

are in the record. The general order provides that where a

consumer has been delinquent three or more times within the preceding

twelve billing periods the Utility may require a cash deposit to

establish a credit. Plaintiff contends that defendant demanded a

\$5 deposit for restoration of the service and that in any event

the \$2.50 exceeded the amount which defendant was entitled to

require under the terms of the general order. Plaintiff, immediately after service was discontinued, sought its restoration. He contends that the defendant thereupon demanded a \$25 cash deposit to establish his credit for the future. Defendant's testimony is that it requested a deposit of \$15. Plaintiff introduced in evidence a letter from the Supervisor of the Public Service Division of the Illinois Commerce Commission written to him September 9, 1938. This refers to plaintiff's recent visit and stated that on the basis of the previous 12 month bills "the credit deposit requested - \$15 - seems to me to be reasonable. It is in keeping with the Commission's General Order No. 109 * * *." This letter then referred to the information that plaintiff had given, that his future requirements for gas and electricity would be less than the past. It advised plaintiff that as a consequence the Commission had recommended and the defendant had agreed to accept the credit of \$12.50. This deposit was thereafter made by the plaintiff and later refunded to him.

Plaintiff says that his service was discontinued without notice or demand and complains that defendant offered no evidence to show that it gave the five day notice required by the general order. In this issue as well as the foregoing issues plaintiff had the burden of proof. He testified that he received no notice, oral or written, before the discontinuation of the service. Defendant's counsel showed plaintiff a document for identification, asking if he had received the original. Plaintiff said he had not. This document was offered in evidence but was excluded on plaintiff's objection that it was a copy and no notice had been served on plaintiff to produce the original.

Defendant's superintendent at Calumet City testified that he had known plaintiff who was a good customer for 20 years and had had many conversations with him before and after the filing

require under the terms of the general order. Plaintiff, immediately after service was discontinued, sought its restoration. He contended that the defendant thereupon demanded a \$25 cash deposit to establish his credit for the future. Defendant's testimony is that it requested a deposit of \$5. Plaintiff introduced in evidence a letter from the supervisor of the Public Service Division of the Illinois Commerce Commission written to him September 9, 1938. This refers to Plaintiff's recent visit and stated that on the basis of the previous 12 month bill "the credit deposit requested - \$5 - seems to me to be reasonable. It is in keeping with the Commission's General Order No. 109 * * *". This letter then referred to the information that Plaintiff had given, that his future requirements for gas and electricity would be less than the past. It advised Plaintiff that as a consequence the Commission had recommended and the defendant had agreed to accept the credit of \$5. This deposit was thereafter made by the Plaintiff and later refunded to him. Plaintiff says that his service was discontinued without notice or demand and complaining that defendant offered no evidence to show that it gave the five day notice required by the general order. In this issue as well as the foregoing issues Plaintiff had the burden of proof. He testified that he received no notice, oral or written, before the discontinuation of the service. Defendant's counsel showed Plaintiff a document for identification, asking if he had received the original. Plaintiff said he had not. This document was offered in evidence but was excluded on Plaintiff's objection that it was a copy and no notice had been served on Plaintiff to produce the original.

Defendant's superintendent at Calumet City testified that he had known Plaintiff who was a good customer for 20 years and had had many conversations with him before and after the filing

of plaintiff's bankruptcy petition with reference to a cash deposit because of past delinquencies. Plaintiff denied these conversations. We have referred to plaintiff's denial of any written notice. Plaintiff's counsel asked defendant's witness, "Did you give a written notice at any time on a form that his credit - was bad and he would have to make a deposit?" The witness answered, "We did." The substance of the balance of the witness's pertinent testimony was that that notice was given, not by defendant's Calumet City office, but by its Joliet office. This testimony was with reference to written notice after the bankruptcy petition was filed and before the service was discontinued. Not only was there no objection to this testimony but it was elicited by the questioning of plaintiff's counsel. It is true that defendant made no effort to introduce further evidence that the written notice was sent from the Joliet office.

We have pointed out the conflict of testimony on these three factual issues. The court found against plaintiff. The question of credibility of the witnesses was for the trial court. We cannot say the trial judge's decision on these questions is against the manifest weight of the evidence.

Plaintiff complains that defense counsel refused to stipulate to the incorporation of the original transcript of testimony in lieu of a copy thereof and also the court's refusal to grant his motion to effect that convenience. He does not say that refusal of counsel and the court was not their privilege under the Civil Practice Act. Since this is discretionary and no abuse of discretion has been complained of or shown, we need not consider the matter.

For the reasons given the judgment of the Municipal Court is affirmed.

Judgment Affirmed.

LEWE AND BURKE, JJ. CONCUR.

of plaintiff's bankruptcy petition with reference to a cash deposit because of past delinquencies. Plaintiff denied these conversations. We have referred to plaintiff's denial of any written notice.

Plaintiff's counsel asked defendant's witness, "Did you give a written notice at any time on a form that his credit - was bad and he would have to make a deposit?" The witness answered, "We did." The substance of the balance of the witness's pertinent testimony was that that notice was given, not by defendant's Counsel City office, but by its Joliet office. This testimony was with reference to written notice after the bankruptcy petition was filed and before the service was discontinued. Not only was there no objection to this testimony but it was elicited by the questioning of plaintiff's counsel. It is true that defendant made no effort to introduce further evidence that the written notice was sent from the Joliet office.

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is affirmed.

Judgment affirmed.

LEWIS AND BUCKLE, JJ. CONCUR.

43644

WILLIAM C. REVIS,

Appellee,

v.

EDWARD THOMPSON,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

328 I.A. 588²

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action. The owner of a building and his tenant, a rooming house operator, were both sued. The tenant Blanche Moss was dismissed before trial by stipulation pursuant to a covenant not to sue, for which plaintiff received \$2,250. The jury returned a general verdict of guilty against Thompson, hereinafter called defendant, and assessed plaintiff's damages at \$5,000. It returned also an inconsistent special verdict. Plaintiff moved to set aside both verdicts and for a new trial. Defendant moved in the alternative for judgment notwithstanding the general verdict or for a judgment pursuant to the special verdict. The trial court granted plaintiff's motions and ordered a new trial. Defendant was granted leave to appeal from that order. Chap. 110, Par. 201 Ill. Rev. Stats.

The building at 6500 Kimbark Avenue, Chicago, Illinois was purchased by defendant in 1931. It was then an old 12 apartment building. After defendant acquired it it was divided into small apartments. In 1939 defendant leased the building and Blanche Moss operated it and collected the rents. She employed plaintiff and his wife and they lived in the building. They collected rents for her and plaintiff did janitor work.

WILLIAM G. REAVIS,

Appellee,

v.

EDWARD THOMPSON,

Appellant.

SUPERIOR COURT

APPEAL FROM

COOK COUNTY.

3231A 588

MR. PRESIDING JUSTICE KILLY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action. The owner of a build-

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The tenant Blanche Moss was dismissed before trial by stipulation

pursuant to a covenant not to sue, for which plaintiff received

\$2,350. The jury returned a general verdict of guilty against

Thompson, hereinafter called defendant, and assessed plaintiff's

damages at \$5,000. It returned also an inconsistent special

verdict. Plaintiff moved to set aside both verdicts and for a

new trial. Defendant moved in the alternative for judgment notwith-

standing the general verdict or for a judgment pursuant to the

special verdict. The trial court granted plaintiff's motions and

ordered a new trial. Defendant was granted leave to appeal from

that order. Chap. 110, Par. 801 Ill. Rev. Stats.

The building at 6500 Kimbark Avenue, Chicago, Illinois

was purchased by defendant in 1931. It was then an old 12 apartment

building. After defendant acquired it it was divided into small

apartments. In 1933 defendant leased the building and Blanche Moss

operated it and collected the rents. She employed plaintiff and

his wife and they lived in the building. They collected rents for

her and plaintiff did janitor work.

September 22, 1939, plaintiff was injured while on his way to the basement of the building. He opened the door leading from a front hall to the basement stairs. He stepped on to a landing at the head of the steps, "some object" rolled under his foot, he lost his balance and fell headfirst down the stairway into the basement. At the time he was blind in one eye and wore glasses but could see where he was going. There was enough light from the vestibule to light up the landing. During his employment he had used the stairway frequently, sometimes 20 or 25 times a day.

The stairway consisted of 13 stairs. The way between the walls was 3 feet wide. Both walls extended downward as far as the basement ceiling, only the left wall, however, went all the way down to the basement. From the basement ceiling on the right side of the stairway there was a wooden banister with a handrail extending to a post near the bottom of the stairs. There were no handrails on the walls. The stairway was used generally by the tenants going to and from the laundry of the building.

Plaintiff charged several specific acts of negligence in his complaint. He withdrew all, however, except one based on defendant's alleged violation of Chapter 64, Sec. 34^{of} the Municipal Code of Chicago, 1939. The case went to the jury on the sole charge that defendant had negligently violated that ordinance in failing to provide and maintain a handrail on the entire stairway and that plaintiff's injuries were approximately caused thereby.

Defendant's counsel denied that the ordinance applied; and denied that if it did, any violation was the proximate cause of plaintiff's injury. He contends here in addition that there was no evidence of any negligence on his part and that the circumstances of this case required that the court enter judgment in his favor

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way to the basement of the building. He opened the door leading

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charge that defendant had negligently violated that ordinance in

failing to provide and maintain a handrail on the entire stairway

and that plaintiff's injuries were approximately caused thereby.

Defendant's counsel denied that the ordinance applied; and

denied that it did, any violation was the proximate cause of

plaintiff's injury. He contends here in addition that there was

no evidence of any negligence on his part and that the circumstances

of this case required that the court enter judgment in his favor

because of the special verdict of the jury. The special verdict of the jury was that the absence of the handrail was not the proximate cause of the plaintiff's injury. The inconsistency is apparent from what we said about the condition of the pleadings on which the case was submitted to the jury.

The question before us is whether the trial court abused its discretion in setting aside the verdicts and granting plaintiff a new trial.

The trial under consideration is the second in this litigation. The result of the first trial was a general verdict of guilty against defendant assessing damages at \$1,000; a general verdict of not guilty as to Blanche Moss; and a special verdict finding that the absence of a handrail was not the proximate cause of plaintiff's injury. The trial court granted plaintiff a new trial as to both defendants. Blanche Moss applied to this court for leave to appeal. Leave was denied. (Opinion No. 42346).

There is no dispute in the evidence. Defendant admits that there was no handrail on the stairway above the basement ceiling. He said there had been none since he became owner.

Plaintiff used the stairway many times daily. His foot slipped on something which lay on the landing. He lost his balance and fell down the stairs. The only testimony bearing on the absence of the handrail is plaintiff's statement that he "was trying to catch hold of something to stop my fall."

Plaintiff says there have been two verdicts in his favor and that he should have a trial on the issues. Defendant refers us to the two special verdicts on the precise question of the absence of the handrail constituting the proximate cause of plaintiff's injury.

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finding that the absence of a handrail was not the proximate cause

of plaintiff's injury. The trial court granted plaintiff a new

trial as to both defendants. Blanche Moss applied to this court

for leave to appeal. Leave was denied. (Opinion No. 48346).

There is no dispute in the evidence. Defendant admits

that there was no handrail on the stairway above the basement

ceiling. He said there had been none since he became owner.

Plaintiff used the stairway many times daily. His foot

slipped on something which lay on the landing. He lost his balance

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of the handrail is plaintiff's statement that he "was trying to catch

hold of something to stop my fall."

Plaintiff says there have been two verdicts in his favor

and that he should have a trial on the issues. Defendant refers

as to the two special verdicts on the precise question of the absence

of the handrail constituting the proximate cause of plaintiff's

injury.

Two juries have found alike on the specific question of defendant's liability arising out of the absence of the handrail. Opposite findings are implicit in the general verdicts, although in the first trial, all charges of specific negligence in the complaint were submitted to the jury. A special verdict controls a general verdict where it is inconsistent with the latter and the court may enter judgment accordingly. Chap. 110, Par. 189, Ill. Rev. Stats.

If plaintiff's testimony at the first trial was substantially the same as in the second, the special verdict there was clearly supported by undisputed testimony as the special verdict is in this case. We believe no good purpose will be served under the circumstances by subjecting defendant to another trial. We see no merit in plaintiff's contention that, while the jury understood the term "proximate cause" as explained in plaintiff's instruction in rendering the general verdict, it did not understand the term in rendering the special verdict.

We need consider no other points.

For the reason given the order of the Superior Court granting plaintiff a new trial is reversed and the cause is remanded with directions to proceed in due course. Kavanaugh v. Washburn, 387 Ill. 204.

REVERSED AND REMANDED WITH DIRECTIONS.

LEWE AND BURKE, JJ. CONCUR.

Two juries have found alike on the specific question of defendant's liability arising out of the absence of the handrail. Opposite findings are implicit in the general verdicts, although in the first trial, all charges of specific negligence in the complaint were submitted to the jury. A special verdict controls a general verdict where it is inconsistent with the latter and the court may enter judgment accordingly. Chap. 110, par. 189, Ill. Rev. Stats.

If plaintiff's testimony at the first trial was substantially the same as in the second, the special verdict there was clearly supported by undisputed testimony as the special verdict is in this case. We believe no good purpose will be served under the circumstances by subjecting defendant to another trial. We see no merit in plaintiff's contention that, while the jury understood the term "proximate cause" as explained in plaintiff's instruction in rendering the general verdict, it did not understand the term in rendering the special verdict.

We need consider no other point.

For the reason given the order of the Superior Court granting plaintiff a new trial is reversed and the cause is remanded with directions to proceed in due course. Kavanaugh v. Ashburn, 387 Ill. 204.

REVERSED AND REMANDED WITH DIRECTIONS.

LEWIS AND CLARK, JJ. CONCUR.

42054, 42055, 42056 and 42057

BLANCHE S. GIDDENS and CHICAGO TITLE
& TRUST COMPANY, as Trustee under the
Last Will and Testament of LOUIS M.
STUMER, Deceased, ELAINE R. REINHARDT
and CHICAGO TITLE & TRUST COMPANY, as
Executors of the Last Will and Testament
of BENJAMIN J. ROSENTHAL, Deceased,
HANNAH ROSENTHAL, GLADYS R. TARTIERE,
ELAINE R. REINHARDT and CHICAGO TITLE
& TRUST COMPANY, as Trustees under the
Last Will and Testament of BENJAMIN J.
ROSENTHAL, Deceased, ELSIE S. ECKSTEIN
and S. S. KRESGE COMPANY, a corporation,

Plaintiffs - Appellants,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendants - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

320 I.A. 588²

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

These appeals are from decrees dismissing for want of equity four complaints filed by lessees of the Board of Education of the City of Chicago, seeking to set aside appraisals of six lots, exclusive of improvements, located in block 142, School Section Addition to Chicago. These lots, together with other property in block 142, are known as "School Fund Property." The appraisals were made by three appraisers as of May 8, 1935, in pursuance of the terms of certain leases wherein the Board of Education is the lessor and the plaintiffs-tenants are the lessees. Under the terms of these leases appraisals were required to be made every 10 years and the amount of rental fixed at 6% of the value of the lots. For instance, the rental for the 10 year period following May 8, 1935 would be 6% of the value of each of the lots as fixed by the appraisers as of that date. The Circuit Court, after hearing the evidence, found that the equities in each case were with the defendant and decreed that each complaint be dismissed for want of equity. From these

42054, 42055, 42056 and 42057

BLANCHES S. GIBBONS and CHICAGO TITLE & TRUST COMPANY, as Trustees under the Last Will and Testament of LOUIS M. STUBBS, Deceased, ELAINE R. REINHARDT and CHICAGO TITLE & TRUST COMPANY, as Executors of the Last Will and Testament of BENJAMIN J. ROSENTHAL, Deceased, HANNAH ROSENTHAL, GLADYS R. TARTAGLIA, ELAINE R. REINHARDT and CHICAGO TITLE & TRUST COMPANY, as Trustees under the Last Will and Testament of BENJAMIN J. ROSENTHAL, Deceased, MERIE S. ROSENTHAL and S. S. FREEDMAN, a corporation,

Plaintiffs - Appellants,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendants - Appellees.

3891A.588

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

These appeals are from decrees dismissing for want of equity four complaints filed by lessees of the Board of Education of the City of Chicago, seeking to set aside appraisals of six lots, exclusive of improvements, located in block 142, School Section Addition to Chicago. These lots, together with other property in block 142, are known as "School Fund Property." The appraisals were made by three appraisers as of May 8, 1935, in pursuance of the terms of certain leases wherein the Board of Education is the lessor and the plaintiff-tenants are the lessees. Under the terms of these leases appraisals were required to be made every 10 years and the amount of rental fixed at 2% of the value of the lots. For instance, the rental for the 10 year period following May 8, 1935 would be 2% of the value of each of the lots as fixed by the appraisers as of that date. The Circuit Court, after hearing the evidence, found that the equities in each case were with the defendant and decreed that each complaint be dismissed for want of equity. From these

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

decrees separate appeals were taken to this court and were here consolidated for hearing. The sufficiency of the complaints is not questioned. In their essential averments they are substantially the same. In each case the defendant filed an answer, denying the essential averments.

Plaintiffs' theory is that each of the lots was overvalued by the appraisers and that the appraisals should be set aside and the true values determined by the court. Plaintiffs' theory, stated more specifically, is as follows: "(1) Two of the appraisers were disqualified to act because of bias and prejudice. The Board of Appraisers was therefore improperly constituted. By reason thereof the appraisal did not comply with the provisions of the leases. The appraisal should have been set aside by the Circuit Court and, upon a charge of overvaluation, that court should have determined de novo the fair cash market value of these lots. (2) The appraisers did not determine the fair cash market value of the lots as of May 8, 1935. Upon the basis of all factual data available, which was exhaustively presented at the trial, it is apparent that the appraisers ignored recognized standards by which the market value of property is determined. (3) The appraisers arrived at values far in excess of the actual market value of the property. Their results could have been reached only by a mistake in the conception of the subject matter of the appraisal (that is, the determination of fair cash market value as distinguished from some theoretical value) or by arbitrarily adopting a valuation which had no relation to market value. (4) It is shown from the evidence presented on behalf of the School Board to the appraisers and to the trial court that if the appraisers, in overvaluing the property, did not act arbitrarily, they made a mistake sufficient to nullify the appraisal in one or all of

dozens separate appeals were taken to this court and were here consolidated for hearing. The sufficiency of the complaints is not questioned. In their essential averments they are substantially the same. In each case the defendant filed an answer, denying the essential averments.

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Circuit Court and, upon a charge of overvaluation, that court should have determined de novo the fair cash market value of these lots. (2) The appraisers did not determine the fair cash market value of the lots as of May 8, 1935. Upon the basis of all factual data available, which was exhaustively presented at the trial, it

is apparent that the appraisers ignored recognized standards by which the market value of property is determined. (3) The

appraisers arrived at values far in excess of the actual market value of the property. Their results could have been reached

only by a mistake in the conception of the subject matter of the appraisal (that is, the determination of fair cash market value as distinguished from some theoretical value) or by arbitrarily adopting a valuation which had no relation to market value. (4)

It is shown from the evidence presented on behalf of the school Board to the appraisers and to the trial court that if the appraisers, in overvaluing the property, did not act arbitrarily, they made a mistake sufficient to nullify the appraisal in one or all of

the following respects: (a) by adopting a theoretical value based on certain computations never used in the purchase or sale of property and having no relation whatever to market value, such as the computations presented by one Fred J. Tucker, the only witness appearing on behalf of the School Board before the appraisers; or (b) by adopting a value designed to produce rentals which the appraisers thought the tenants ought to pay; or (c) by adopting a speculative future value rather than the actual market value on May 8, 1935. (5) The appraisers grossly overvalued the lots to such a degree as to demonstrate that they disregarded 'known conditions essential to a just ascertainment of value', and that the values found were not the result of unbiased judgment, but were the result of arbitrary and wilful acts, which is the 'equivalent of an intention to make a grossly excessive' appraisal. Such gross overvaluations require the setting aside of the appraisals even in the absence of proof aliunde that any one of the appraisers was disqualified or biased. If any one of these grounds be maintained, the appraisals should be set aside and the fair cash market value of the six lots determined by the court in the amounts for which the plaintiffs contend." The defendant's theory, in its essence, is a negation of each of the grounds stated by plaintiffs.

The properties involved are lots 3, 7, 31, 32, 33 and 34, all located on the west side of State Street, between Madison and Monroe Streets in the City of Chicago. They are in the heart of the city's chief retail merchandising district. Each is an inside lot, having a frontage of 24 feet and a depth of 120 feet, to a 15 foot alley running north and south in the rear. We give a brief description of the entire east side of the block as it existed

the following respects: (a) by adopting a theoretical value based on certain computations never used in the purchase or sale of property and having no relation whatever to market value, such as the computations presented by one Fred L. Tucker, the only witness appearing on behalf of the School Board before the appraisers; or (b) by adopting a value designed to produce rentals which the appraisers thought the tenants ought to pay; or (c) by adopting a speculative future value rather than the actual market value on May 8, 1935. (8) The appraisers grossly overvalued the lots to such a degree as to demonstrate that they disregarded 'known conditions essential to a just ascertainment of value', and that the values found were not the result of unbiased judgment, but were the result of arbitrary and wilful acts, which is the 'equivalent of an intention to make a grossly excessive' appraisal. Such gross overvaluations require the setting aside of the appraisals even in the absence of proof alimda that any one of the appraisers was disqualified or biased. If any one of these grounds be maintained, the appraisals should be set aside and the fair cash market value of the six lots determined by the court in the amounts for which the plaintiffs contend." The defendant's theory, in its essence, is a negation of each of the grounds stated by plaintiffs. The properties involved are lots 2, 7, 21, 22, 23 and 24, all located on the west side of State Street, between Madison and Monroe Streets in the City of Chicago. They are in the heart of the city's chief retail merchandising district. Each is an inside lot, having a frontage of 24 feet and a depth of 120 feet, to a 15 foot alley running north and south in the rear. We give a brief description of the entire east side of the block as it existed

on May 8, 1935. At the southwest corner of Madison and State Streets is the fireproof Chicago Building, covering lots 1 and 2, with a total frontage of 48 feet and a depth of 120 feet, occupied in the main by offices, but having some retail stores. This parcel is not here involved. Adjoining this property is lot 3, whose value is at issue in this case. At the time of the appraisal it was occupied by the Castle Theatre on the ground floor and the upper floors were occupied by Gately-Wheeler under a sublease from the Castle Theatre, and engaged in merchandising men's wear. Proceeding in a southerly direction the next adjoining lots 4, 5 and 6, (not involved) each having the same frontage and depth as lot 3, were improved by a six story fireproof building, occupied by the S. S. Kresge Company 5 and 10 cent store. Next is lot 7, whose value is involved, which was improved with an old seven story non-fireproof building and occupied by the Red Robin Hosiery Company. Lot 8, (not involved) adjoining lot 7, was improved with a six story old non-fireproof building occupied by Bezarks, engaged in merchandising women's wear and millinery. Next are lots 31 and 32, here involved, improved with a seven story fireproof building occupied by the S. S. Kresge Company, where it conducted a 25 cent to \$1.00 store. Between lots 8 and 31 is an alley running east and west. To the south of lots 31 and 32 are lots 33 and 34, here involved. These two lots were improved with a comparatively new seven story fireproof building, occupied by two subtenants, namely, Maling, merchandising women's shoes, and by Grayson, merchandising women's wear. These two merchants divided the ground floor. Maling occupied the entire basement and Grayson the entire second floor, and between them they divided the upper floors. Adjoining lot 34, not involved, is the fireproof North American Building at the northwest corner of State and Monroe Streets, occupied by offices and shops.

on May 24, 1935. At the southwest corner of Madison and State Streets is the fireproof Chicago Building, covering lots 1 and 2, with a total frontage of 48 feet and a depth of 120 feet, occupied in the main by offices, but having some retail stores. This parcel is not here involved. Adjoining this property is lot 3, whose value is at issue in this case. At the time of the appraisal it was occupied by the Castle Theatre on the ground floor and the upper floors were occupied by Gately-Wheeler under a sublease from the Castle Theatre, and engaged in merchandising men's wear. Proceeding in a southerly direction the next adjoining lots 4, 5 and 6, (not involved) each having the same frontage and depth as lot 3, were improved by a six story fireproof building, occupied by the S. A. Kresge Company 5 and 10 cent store. Next is lot 7, whose value is involved, which was improved with an old seven story non-fireproof building and occupied by the Red Robin Hosiery Company. Lot 8, (not involved) adjoining lot 7, was improved with a six story old non-fireproof building occupied by Bezaria, engaged in merchandising women's wear and millinery. Next are lots 31 and 32, here involved, improved with a seven story fireproof building occupied by the S. A. Kresge Company, where it conducted a 25 cent to 1.00 store. Between lots 8 and 31 is an alley running east and west. To the south of lots 31 and 32 are lots 33 and 34, here involved. These two lots were improved with a comparatively new seven story fireproof building, occupied by two subtenants, namely, Mailing, merchandising women's shoes, and by Grayson, merchandising women's wear. These two merchants divided the ground floor. Mailing occupied the entire basement and Grayson the entire second floor, and between them they divided the upper floors. Adjoining lot 34, not involved, is the fireproof North American Building at the northwest corner of State and Monroe Streets, occupied by offices and shops.

The original leases, dated May 8, 1880, were to expire by their terms on May 8, 1930. Supplemental leases dated June 15, 1888 by their terms expire on May 8, 1985. The leases on the respective lots are substantially the same. The original leases provided for the payment of a stipulated rental from May 8, 1880 to May 8, 1885. As to the rental payable for the remainder of the term, three "discreet male residents of the City of Chicago" were to be appointed by the Board of Education to determine the "true cash value of said demised lots, not taking into consideration the Improvements thereon," as of May 8, 1885. For the succeeding five years, to May 8, 1890, the rental was to be 6% of the "true cash value," as fixed by the appraisers as of May 8, 1885. Each five years thereafter, until the termination of the leases, appraisers were in like manner to be appointed by the Board of Education, and the rental in each case for each succeeding five years was to be 6% of the true cash value so found by the appraisers as of each May 8th. Litigation ensued at the instance of the lessees, over the first appraisal of May 8, 1885. Some time prior to June 15, 1888 a compromise was reached, which resulted in the supplemental leases of that date. The supplemental leases provided that new appraisals should be made as of May 8, 1895, and that appraisals were to be made on each May 8th every ten years thereafter. The method of appointing appraisers was changed. Instead of the Board of Education appointing all three, it was to appoint one, who was to act as chairman. The judge of the Circuit Court (now the District Court) of the United States, Northern District of Illinois, was to appoint a second and a third was to be appointed by the judge of the Probate Court of Cook County. It is to be noted that the tenants have no voice in the choice of any of the appraisers. Since the execution of the supplemental leases, appraisals have been made as of the

The original leases, dated May 8, 1880, were to expire by their terms on May 8, 1890. Supplemental leases dated June 15, 1888 by their terms expire on May 8, 1895. The leases on the respective lots are substantially the same. The original leases provided for the payment of a stipulated rental from May 8, 1880 to May 8, 1895. As to the rental payable for the remainder of the term, three "discreet male residents of the City of Chicago" were to be appointed by the Board of Education to determine the "true cash value of said leased lots, not taking into consideration the improvements thereon," as of May 8, 1895. For the succeeding five years, to May 8, 1900, the rental was to be 5% of the "true cash value," as fixed by the appraisers as of May 8, 1895. Each five years thereafter, until the termination of the lease, appraisers were in like manner to be appointed by the Board of Education, and the rental in each case for each succeeding five years was to be 5% of the true cash value so found by the appraisers as of each May 8th. Litigation ensued at the instance of the lessees, over the first appraisal of May 8, 1895. Some time prior to June 15, 1898 a compromise was reached, which resulted in the supplemental leases of that date. The supplemental leases provided that new appraisals should be made as of May 8, 1895, and that appraisals were to be made on each May 8th every ten years thereafter. The method of appointing appraisers was changed. Instead of the Board of Education appointing all three, it was to appoint one, who was to act as chairman. The Judge of the Circuit Court (now the District Court) of the United States, Northern District of Illinois, was to appoint a second and a third was to be appointed by the Judge of the Probate Court of Cook County. It is to be noted that the tenants have no voice in the choice of any of the appraisers. Since the execution of the supplemental leases, appraisals have been made as of the

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following dates: May 8, 1895, May 8, 1905, May 8, 1915, May 8, 1925 and May 8, 1935.

The leases provide the following qualifications of the appraisers: " * * * shall each appoint one discreet male resident of the City of Chicago, not interested as lessee or mortgagee of school property in said city * * *." The function of the appraisers is stated in the fourth paragraph of the supplemental leases as follows: " * * * to determine under oath first duly taken, the true cash value of said demised land at the time of such appraisal, exclusive of the improvements thereon." The fourth paragraph of the supplemental leases also provides: " * * * It is hereby declared by the parties hereto that it is not the purpose of this instrument that the persons appointed as appraisers hereunder, or either of them, shall be the representatives of either of the parties hereto." The fifth paragraph of the supplemental leases provides:

"That notwithstanding anything in said lease or in this supplement thereto contained the persons who shall at any time be appointed thereunder to fix and determine the value of the leased land *** shall at all times and under all circumstances be held to be appraisers and not arbitrators, and shall not be bound to give notice of their meetings or proceedings to the parties hereto, except as hereinafter expressly provided."

A clause in the original leases provides that lessees shall be estopped from objecting to any matter, thing or proceeding connected with the appointment of the appraisers or their qualifications or action as appraisers, unless such objection be made in writing to the Board of Education and filed with the clerk of the Board within 30 days after the appointment of such appraisers. The supplemental leases provide that the lessee shall be notified by mail of the appointment of the appraisers. The lessees, within 20 days after the mailing of notice, may file with the appraisers a written statement or argument, and the lessor is given the privilege of filing a reply within 20 days after receipt of the lessees' statement or argument. To the lessor's statement or argument, the lessees

following dates: May 8, 1935, May 8, 1936, May 8, 1937, May 8, 1938 and May 8, 1939.

The leases provide the following qualifications of the appraisers: " * * * shall each appoint one discreet male resident of the City of Chicago, not interested as lessee or mortgagee of school property in said city * * * ". The function of the appraisers is stated in the fourth paragraph of the supplemental leases as follows: " * * * to determine under oath first duly taken, the true cash value of said demise land at the time of such appraisal, exclusive of the improvements thereon. " The fourth paragraph of the supplemental leases also provides: " * * * It is hereby declared by the parties hereto that it is not the purpose of this instrument that the persons appointed as appraisers hereunder, or either of them, shall be the representatives of either of the parties hereto. " The fifth paragraph of the supplemental leases provides:

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may rejoin within 10 days after the receipt of the lessor's statement or argument.

The following provisions of the leases indicate the breadth of the appraisers' discretion:

" * * * The sole provision of the four preceding provisions is to allow the parties to present to the appraisers information within their possession and their views concerning the value of the demised land. But it is expressly understood and agreed that the appraisers shall not be concluded in any event by the statements so made, but shall be at liberty to seek or obtain such information as they deem pertinent either with or without notice to the parties, and to make their appraisal upon all facts within their knowledge, notwithstanding anything contained in the said written statements above provided for. That notwithstanding anything in said lease contained the appraisers shall be at liberty in forming their judgment of the value of the land, without including the value of the improvements thereon, to take into consideration if and so far as they deem it pertinent to do so, the improvements on such land and the character, condition, value, cost, rental expenses and other particulars thereof, and any other facts or information from whatever source bearing upon the question of the actual value of said land, and it shall be the duty of the lessee to furnish appraisers promptly on request a statement showing the rental receipts and disbursements on account of said improvements for five years as near as may be next preceding the time of the appraisalment."

In due time appraisers were appointed to make appraisals of school fund properties as of May 8, 1935. Among these properties were the lots in question. The Board appointed George B. Carpenter, a former judge of the United States District Court, Judge James H. Wilkerson, then senior judge of the United States District Court, appointed Paul Steinbrecher. The judge of the Probate Court appointed Wallace G. Clark. The persons appointed by the two judges were in the real estate business with offices in the central business district. Within the time and in the manner provided in the leases, the tenants filed objections to the appointment of Steinbrecher and Clark. The objections were grounded on the claim that both were disqualified. The basis of these contentions were fully stated in the respective objections. After hearings before the respective appointing judges, the applications for reconsider-

may rejoin within 10 days after the receipt of the lessor's statement or argument.

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breadth of the appraisers' discretion:

" * * * The sole provision of the four preceding provisions is to allow the parties to present to the appraisers information within their possession and their views concerning the value of the demised land. But it is expressly understood and agreed that the appraisers shall not be concluded in any event by the statements so made, but shall be at liberty to seek or obtain such information as they deem pertinent either with or without notice to the parties, and to make their appraisal upon all facts within their knowledge, notwithstanding anything contained in the said written statements above provided for. That notwithstanding anything in said lease contained the appraisers shall be at liberty in forming their judgment of the value of the land, without including the value of the improvements thereon, to take into consideration it and so far as they deem it pertinent to do so, the improvements on such land and the character, condition, value, cost, rental expenses and other particulars thereof and any other facts or information from whatever source bearing upon the question of the actual value of said land, and it shall be the duty of the lessee to furnish appraisers promptly on request a statement showing the rental receipts and disbursements on account of said improvements for five years as near as may be next preceding the time of the appraisement."

In due time appraisers were appointed to make appraisals of school fund properties as of May 5, 1935. Among these properties were the lots in question. The Board appointed George R. Carpenter, a former judge of the United States District Court, Judge James H. Wikstrom, then senior judge of the United States District Court, appointed Paul Steinhilber. The judge of the Probate Court appointed Wallace G. Clark. The persons appointed by the two judges were in the real estate business with offices in the central business district. Within the time and in the manner provided in the lease, the tenants filed objection to the appointment of Steinhilber and Clark. The objections were grounded on the claim that both were disqualified. The basis of these contentions were fully stated in the respective objections. After hearings before the respective appointing judges, the applications for reconsideration

ation of the appointments and for the appointment of substitute appraisers were denied. All three appraisers accepted their respective appointments and proceeded to give to lessees notice of the hearings. As contemplated by the leases, Judge Carpenter became Chairman. The lessees filed statements as permitted by the terms of the leases and the lessor filed its several replies. The appraisers then proceeded with the hearings. In due course and within the time prescribed by the leases the appraisers reported the following valuations of the lots, exclusive of improvements, as of May 8, 1935:

| | |
|----------------|-----------|
| Lot 3 | \$525,600 |
| Lot 7 | 496,800 |
| Lots 31 and 32 | 1,022,400 |
| Lots 33 and 34 | 993,600 |

This gives a square foot value to lots 7, 32, 33 and 34 of \$172, and a square foot value to lot 3, with its corner premium, and to lots 8 and 31, with their alley premium, in excess of \$182 each. Again, in due course and within the prescribed time, the tenants filed their objections, restating those made originally, to the qualifications of the appraisers, and additional objections based on the charge that the respective valuations were excessive. Threats of forfeiture and of imposition of penalties provided for in the leases, were made by the Board. The complaints at bar were then filed, asking that the appraisals be set aside and that the defendant be enjoined from enforcing penalties. Motions for temporary injunctions restraining the Board from imposing forfeitures and penalties were denied, but an order was entered providing that while the tenants (plaintiffs) paid the rent on the basis of the contested May 8, 1935 appraisals, there should be no forfeitures or penalties imposed.

Plaintiffs contend that we should set aside the 1935 appraisal and make an appraisal de novo on two broad grounds,

Improvements, as of May 8, 1935:

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| | |
|----------------|-----------|
| Lot 3 | \$525,800 |
| Lot 7 | 498,200 |
| Lots 31 and 32 | 1,022,400 |
| Lots 33 and 34 | 937,600 |

This gives a square foot value to lots 7, 31, 32 and 34 of \$12.50, and a square foot value to lot 3, with its corner premium, and to lots 8 and 31, with their alley premium, in excess of \$182 each. Again, in due course and within the prescribed time, the tenants filed their objections, restating those made originally, to the qualifications of the appraisers, and additional objections based on the charge that the respective valuations were excessive. Threats of forfeiture and of imposition of penalties provided for in the lease, were made by the Board. The complaints at bar were then filed, asking that the appraisals be set aside and that the defendant be enjoined from enforcing penalties. Motions for temporary injunctions restraining the Board from imposing forfeitures and penalties were denied, but an order was entered providing that while the tenants (plaintiffs) paid the rent on the basis of the contested May 8, 1935 appraisals, there should be no forfeitures or penalties imposed. Plaintiffs contend that we should set aside the 1935 appraisal and make an appraisal de novo on two broad grounds,

each of which stands on its own footing: First, that the appraisal was made by an illegally constituted board of appraisers, two of whom were disqualified, and second, that the appraisal was so excessive and so irreconcilable with readily obtainable facts and recognized standards of value as to show that the appraisers acted arbitrarily, committing a constructive fraud, or made a mistake in the conception of their duties. We turn to a consideration of plaintiffs' contention that the appraisal should be set aside because two of the appraisers were biased and prejudiced, and were therefore disqualified to act. The objections are directed against Paul Steinbrecher, who was also a 1925 appraiser, and Wallace G. Clark. Clark and J. Milton Trainer were partners for over 40 years under the firm name of Clark and Trainer. While Steinbrecher was an appraiser in 1925, Trainer was a school board value witness in the appraisal of that year. Steinbrecher joined in the appraisal which measured the increase in value between 1915 and 1925 at 80%. Trainer, Clark's partner, sponsored as a witness for the Board these same values in the 1925 litigation. Plaintiffs assert that Clark was disqualified to act as an appraiser because of his partnership with Trainer, which prevented him from exercising his free and independent judgment as an appraiser. The partners had an intimate personal relationship extending over a period of 45 years. They owned real estate in common. Their partnership agreement required that they share equally the expenses and profits of the partnership business. It included a share in fees earned by Trainer as an appraiser and expert witness, and also included the fees Clark charged for his services as a 1935 School Board appraiser.

Trainer was originally employed by the Board as an expert witness in the 1925 litigation in July of that year. A considerable portion of the work done by Trainer was done in the firm's office,

each of which stands on its own footing: First, that the appraisal was made by an illegally constituted board of appraisers, two of whom were disqualified, and second, that the appraisal was so excessive and so irreconcilable with readily obtainable facts and recognized standards of value as to show that the appraisers acted arbitrarily, committing a constructive fraud, or made a mistake in the conception of their duties. We turn to a consideration of plaintiffs' contention that the appraisal should be set aside because two of the appraisers were biased and prejudiced, and were therefore disqualified to act. The objections are directed against Paul Steinbrecher, who was also a 1935 appraiser, and Wallace G. Clark. Clark and J. Milton Trainer were partners for over 40 years under the firm name of Clark and Trainer. While Steinbrecher was an appraiser in 1935, Trainer was a school board value witness in the appraisal of that year. Steinbrecher joined in the appraisal which measured the increase in value between 1915 and 1935 at 80%. Trainer, Clark's partner, sponsored as a witness for the Board these same values in the 1935 litigation. Plaintiffs assert that Clark was disqualified to act as an appraiser because of his partnership with Trainer, which prevented him from exercising his free and independent judgment as an appraiser. The partners had an intimate personal relationship extending over a period of 45 years. They owned real estate in common. Their partnership agreement provided that they share equally the expenses and profits of the partnership business. It included a share in fees earned by Trainer as an appraiser and expert witness, and also included the fees Clark charged for his services as a 1935 School Board appraiser.

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Trainer's data were assembled and kept in their office, to which Clark had full access. During Trainer's participation in the 1925 contest, Clark and Trainer were in almost daily and intimate conferences. Trainer was assisted in his work by the Clark and Trainer office staff. Clark attended several of the hearings before the Master. The charges for Trainer's services in the 1925 case were posted on the firm's books and Clark was credited with one half of the fees.

The amount of fees to be paid by the Board was not fixed until after the 1935 appraisers had made their appraisal. In 1934 the School Board applied to the R. F. C. for a loan of \$22,000,000 to pay back salaries of teachers and principals. On June 22, 1934, immediately after the hearings in the 1925 case were concluded before the Master, the R. F. C. employed Trainer to make appraisals of school fund properties in connection with that loan. The lots now in controversy were part of the property so to be appraised. Clark was to share in the appraisal fees. Fred J. Tucker, who also testified in behalf of the School Board in the 1925 case and who was the sole witness testifying before the 1935 appraisers on value for the Board, was the other appraiser appointed to act with Trainer in the R. F. C. valuation.

The data on the R. F. C. appraisals were assembled in the Clark and Trainer office. While Trainer was engaged in making these appraisals, he was in daily contact with Clark. Trainer prepared the R. F. C. appraisal report in the Clark and Trainer office in October, 1934. Trainer discussed the R. F. C. appraisals with Clark and Clark knew of the report which reposed in the partnership records. Charges were made on the firm's books for Trainer's services, in which Clark had a one half interest. The hearings in the 1925 case were not concluded until June, 1934. On June 22, 1934 Trainer was employed to make the R. F. C. appraisals. It

Trainer's data were assembled and kept in their office, to which Clark had full access. During Trainer's participation in the 1935 contest, Clark and Trainer were in almost daily and intimate conferences. Trainer was assisted in his work by the Clark and Trainer office staff. Clark attended several of the hearings before the Master. The charges for Trainer's services in the 1935 case were posted on the firm's books and Clark was credited with one half of the fees.

The amount of fees to be paid by the Board was not fixed until after the 1935 appraisers had made their appraisal. In 1934 the School Board applied to the R. F. G. for a loan of \$2,000,000 to pay back salaries of teachers and principals. On June 28, 1934,

immediately after the hearings in the 1935 case were concluded before the Master, the R. F. G. employed Trainer to make appraisals of school fund properties in connection with that loan. The lots now in controversy were part of the property so to be appraised.

Clark was to share in the appraisal fees. Fred J. Tucker, who also testified in behalf of the School Board in the 1935 case and who was the sole witness testifying before the 1935 appraisers on value for the Board, was the other appraiser appointed to act with Trainer in the R. F. G. valuation.

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was not until October, 1934 that the appraisal reports were prepared. On February 9, 1935 Clark was appointed as one of the School Board appraisers, less than four months after the R. F. C. appraisals by Trainer and Tucker. The R. F. C. appraisals were made within six months of the 1935 appraisal date of May 8, 1935.

Plaintiffs point out that the firm had been paid for the R. F. C. appraisals, that Clark had shared in these fees, and that he was not at liberty to depart substantially from the 1934 values without reluctance and embarrassment. Plaintiffs state that Clark knew that under the partnership agreement he would be obliged to share his 1935 appraisal fees with Trainer, that since he shared in Trainer's fees and Trainer would share in Clark's 1935 appraisal fees, Clark could not substantially depart from the Trainer-Tucker values, when so short a time intervened between October, 1934 and May 8, 1935. Plaintiffs argue that Clark was not free to exercise the broad discretion reposed in him by the leases, and that Clark had a predilection, whether conscious or unconscious, to sustain substantially the appraisals of his partner, made a few months before.

It is interesting to note that in the 1925 case the values given by Trainer were the values which this court ultimately fixed as the true cash market values as of May 8, 1925. The appraisal date with which Trainer was occupied was May 8, 1925 and the appraisal in which Clark participated took place as of May 8, 1935. Clark did not participate in the R. F. C. appraisal. The report went out over the signatures of Trainer and Tucker. In our opinion, the fact that Clark was a partner of Trainer and that they participated in the fees, did not disqualify Clark to act as an appraiser.

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our opinion, the fact that Clark was a partner of Trainer and

that they participated in the fees, did not disqualify Clark

to act as an appraiser.

Turning to a consideration of the charge that Steinbrecher was disqualified to act as an appraiser, plaintiffs state that he was one of the three 1925 appraisers and that he appeared as a witness in that controversy; that in that contest considerable feeling was undoubtedly engendered; that he was charged with acting arbitrarily, capriciously, as biased, prejudiced, guilty of misconduct, moved by improper influences and acting fraudulently; that the Supreme Court in setting aside the appraisals, made comments on the actions of the appraisers which carried sting; and that the lessees refused to pay the fees charged by Steinbrecher for the 1925 appraisal. The record shows that the 1925 appraisers charged \$10,000 each, or a total of \$30,000, of which \$15,000 was to be paid by the Board and \$15,000 by the lessees. Apparently, the Board paid its share. Most of the lessees failed to pay their share. Steinbrecher's share to be paid by the lessees would be \$5,000. We find that the failure of the lessees to pay Steinbrecher their share of his 1925 appraisal fee did not disqualify him as a 1935 appraiser; nor did the criticism of the 1925 appraisal disqualify him in 1935. Under the charge of disqualification, plaintiffs insist that the proceedings before the appraisers show that Clark and Steinbrecher were biased. We cannot agree with the contention that the proceedings before the appraisers show that Clark and Steinbrecher were biased. We agree that the proceedings before the appraisers show that they were fair and impartial to both lessor and lessees.

Our courts of review have held that the term "true cash market value" means fair cash market value. It is the price at which a seller, not compelled to sell, is willing to sell, and a price at which a buyer, not compelled to buy, is willing to buy. Plaintiffs urge that the appraisers so grossly overvalued these lots that constructive fraud will be inferred; that the finding

Turning to a consideration of the charges that Steinhilber was disqualified to act as an appraiser, plaintiff's state that he was one of the three 1935 appraisers and that he appeared as a witness in that controversy; that in that contest considerable feeling was undoubtedly engendered; that he was charged with acting arbitrarily, capriciously, as biased, prejudiced, guilty of misconduct, moved by improper influences and acting fraudulently; that the Supreme Court in setting aside the appraisals, made comments on the actions of the appraisers which carried sting; and that the lessees refused to pay the fees charged by Steinhilber for the 1935 appraisal. The record shows that the 1935 appraisers charged 10,000 each, or a total of \$30,000, of which 15,000 was to be paid by the Board and 15,000 by the lessees. Apparently, the Board paid its share. Most of the lessees failed to pay their share. Steinhilber's share to be paid by the lessees would be 5,000. We find that the failure of the lessees to pay Steinhilber their share of his 1935 appraisal fee did not disqualify him as a 1935 appraiser; nor did the criticism of the 1935 appraisal disqualify him in 1936. Under the charge of disqualification, plaintiffs insist that the proceedings before the appraisers show that Clark and Steinhilber were biased. We cannot agree with the contention that the proceedings before the appraisers show that Clark and Steinhilber were biased. We agree that the proceedings before the appraisers show that they were fair and impartial to both lessor and lessees.

Our courts of review have held that the term "true cash market value" means fair cash market value. It is the price at which a seller, not compelled to sell, is willing to sell, and a price at which a buyer, not compelled to buy, is willing to buy. Plaintiffs urge that the appraisers so grossly overvalued these lots that constructive fraud will be inferred; that the finding

was arbitrary and not the exercise of judgment; that the appraisers disregarded readily obtainable facts; that the appraisal is without basis in fact; and that the appraisers and defendant's experts misconceived the meaning of fair cash market value. Plaintiffs urge that the appraisers mistakenly followed the rule laid down in the Matter of Board of Water Supply of New York, 277 N. Y. 452, of "Fair, economic, just and equitable value under normal conditions," rather than the Illinois rule, and complain that although the appraisal of 1925 gave full effect to an 80% increase in market value over the previous appraisal year of 1915, the appraisers in 1935 allowed only a 13-1/2% reduction from the values fixed in 1925. Defendant replies that a decline in values as of May 8, 1935 was recognized and considered by the appraisers and was fully reflected in their values.

In considering these leases, the Supreme Court in

Sebree v. Board of Education, 254 Ill. 438, said (455):

"The rule in this State has been that the findings of appraisers are conclusive upon the parties in the absence of fraud or mistake and will not be set aside merely because the valuation appears too high."

The parties were entitled to an honest appraisal, free of fraud or mistake. The parties presented testimony and exhibits as to every element that could reasonably throw light on the market value of this land as of May 8, 1935. Concededly, this land is very valuable and has never been offered for sale. Only one witness, Tucker, testified as an expert for the Board before the appraisers. As we have observed, one of the appraisers was an able, honest and respected retired jurist, and the other two were real estate men of standing who had a vast experience in appraising real estate in the central business district. Under the leases the appraisers were not confined to the testimony and exhibits presented to them. They were at liberty to seek and obtain such information as they deemed pertinent, and to make their appraisal upon all facts within their

was arbitrary and not the exercise of judgment; that the appraisers disregarded readily obtainable facts; that the appraisal is without basis in fact; and that the appraisers and defendant's experts misconceived the meaning of fair cash market value. Plaintiffs urge that the appraisers mistakenly followed the rule laid down in the Matter of Board of Water Supply of New York, 277 N. Y. 452, of "fair, economic, just and equitable value under normal conditions," rather than the Illinois rule, and complain that although the appraisal of 1935 gave full effect to an 80% increase in market value over the previous appraisal year of 1915, the appraisers in 1935 allowed only a 13-1/2% reduction from the values fixed in 1925. Defendant replies that a decline in values as of May 6, 1935 was recognized and considered by the appraisers and was fully reflected in their values.

In considering these issues, the Supreme Court in

Reese v. Board of Education, 284 Ill. 436, said (455):

"The rule in this State has been that the findings of appraisers are conclusive upon the parties in the absence of fraud or mistake and will not be set aside merely because the valuation appears too high."

The parties were entitled to an honest appraisal, free of fraud or mistake. The parties presented testimony and exhibits as to every element that could reasonably throw light on the market value of this land as of May 6, 1935. Consequently, this land is very valuable and has never been offered for sale. Only one witness, Tucker, testified as an expert for the Board before the appraisers. As we have observed, one of the appraisers was an able, honest and respected retired jurist, and the other two were real estate men of standing who had a vast experience in appraising real estate in the central business district. Under the leases the appraisers were not confined to the testimony and exhibits presented to them. They were at liberty to seek and obtain such information as they deemed pertinent, and to make their appraisal upon all facts within their

knowledge, notwithstanding anything contained in the written statements. In no instance have the values as established by the appraisers ever been ultimately reduced. We have carefully studied the voluminous record in this case and are convinced that the appraisers, in finding the fair cash market value of the lots in question as of May 8, 1935, were not mistaken, and that a charge of fraud, actual or constructive, against them, cannot be sustained.

Testimony was presented in support of the assertion of plaintiffs that prospective buyers and sellers of real estate in the central business district were apprehensive of the stability of existing business and rents because of decentralizing forces resulting in the growth of outlying business districts. Defendant opposes this contention. We are of the view that plaintiffs have not established that prospective buyers and sellers of loop property were affected adversely by so-called decentralizing forces resulting in the growth of outlying business districts.

Finally, plaintiffs maintain that the terms of the School Board leases depreciated the value of the land. Two of plaintiffs' witnesses fixed the depreciation at 20% and two at 25%. We are of the opinion, as in Board of Education v. Beck, 293 Ill. App. 630, (abst.) that these leases do not depreciate the value of the land. We are also of the opinion that the leases do not increase the risks to be assumed by a buyer, even though they may lack some of the provisions of other long term leases. There is merit in defendant's contention that the tenants, having entered into these leases of their own free will and through their own negotiations providing for the revaluation method in fixing their decennial rent, are now estopped to assert that the method itself, or any of the other terms of the leases, are factors which they can now

knowledge, notwithstanding anything contained in the written statements. In no instance have the values as established by the appraisers ever been ultimately reduced. We have carefully

studied the voluminous record in this case and are convinced that the appraisers, in finding the fair cash market value of the lots in question as of May 8, 1935, were not mistaken, and that a charge of fraud, actual or constructive, against them, cannot be sustained.

Testimony was presented in support of the assertion of plaintiffs that prospective buyers and sellers of real estate in the central business district were apprehensive of the stability of existing business and rents because of decentralizing forces resulting in the growth of outlying business districts. Defendant opposes this contention. We are of the view that plaintiffs have not established that prospective buyers and sellers of loop property were affected adversely by so-called decentralizing forces resulting in the growth of outlying business districts.

Finally, plaintiffs maintain that the terms of the School Board leases depreciated the value of the land. Two of plaintiffs' witnesses fixed the depreciation at 20% and two at 35%. We are of the opinion, as in Board of Education v. Beck, 333 Ill. App. 630, (1928), that these leases do not depreciate the value of the land. We are also of the opinion that the leases do not increase the risks to be assumed by a buyer, even though they may lack some of the provisions of other long term leases. There is merit in defendant's contention that the tenants, having entered into these leases of their own free will and through their own negotiations providing for the revaluation method in fixing their decennial rent, are now estopped to assert that the method itself, or any of the other terms of the leases, are factors which they can now

utilize to their advantage in procuring rent reductions.

For the reasons stated, the decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED.

KILEY, P.J. AND LEWE, J. CONCUR.

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For the reasons stated, the decree of the Circuit Court
of Cook County is affirmed.

DECREE AFFIRMED.

KILLEY, P. J. AND LEWIS, J. CONCUR.

43571

JOHN MATTEIS,

Appellee,

v.

EDITH MATTEIS,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

323 I.A. 589

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On March 15, 1944 John Matteis filed a complaint for divorce against Edith Matteis in the Superior Court of Cook County, on the ground that on or about March 10, 1943 she wilfully deserted and absented herself from him without any reasonable cause, and "persisted in such desertion" without any fault on his part for more than one year prior to the filing of the complaint. In an answer she denied the charge of desertion. Following a trial, the court entered a decree finding that the defendant wilfully deserted and absented herself from the plaintiff without any reasonable cause for the space of one year immediately prior to the filing of the complaint; dissolved the bonds of matrimony between the parties; decreed that he pay her attorney's fees in the sum of \$250; that she be awarded all the household furniture and effects of the parties; and that the parties be barred from making or having any claim against each other by virtue of the marital relationship theretofore existing between them. Defendant appeals.

Plaintiff married defendant at Davenport, Iowa on May 16, 1939 and lived with her until March 10, 1943. Although they were married in Iowa, they were residents of Cook County. Previous to their marriage, defendant lived with her mother in the first floor apartment of a two story building at 2101 South 61st Avenue,

APPEAL FROM

SUPERIOR COURT

COOK COUNTY,

JOHN MATTELS,

Appellee,

v.

EDITH MATTELS,

Appellant.

328 I.A. 589

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On March 15, 1944 John Mattels filed a complaint for

divorce against Edith Mattels in the Superior Court of Cook County, on the ground that on or about March 10, 1943 she wilfully deserted and absented herself from him without any reasonable cause, and "persisted in such desertion" without any fault on his part for more than one year prior to the filing of the complaint. In an answer she denied the charge of desertion. Following a trial, the court entered a decree finding that the defendant wilfully deserted and absented herself from the plaintiff without any reasonable cause for the space of one year immediately prior to the filing of the complaint; dissolved the bonds of matrimony between the parties; decreed that he pay her attorney's fees in the sum of \$250; that she be awarded all the household furniture and effects of the parties; and that the parties be barred from making or having any claim against each other by virtue of the marital relationship theretofore existing between them. Defendant appeals.

Plaintiff married defendant at Davenport, Iowa on May 18,

1939 and lived with her until March 10, 1943. Although they were

married in Iowa, they were residents of Cook County. Previous

to their marriage, defendant lived with her mother in the first

floor apartment of a two story building at 2101 South State Avenue,

Cicero, Illinois. At the time of their marriage this property was owned by Anton Trojan and Ella Trojan, husband and wife, who lived in the basement apartment. Following the marriage of plaintiff and defendant, they returned to Cicero, where they lived in the first floor apartment at 2101 South 61st Avenue, formerly occupied by defendant and her mother. They lived there until Wednesday, March 10, 1943. No children were born of the marriage. Plaintiff was employed as a clerk in a "hand book." In 1943 defendant was employed in a defense plant located close to her home.

Plaintiff testified that sometimes he paid the rent to the Trojans and sometimes his wife paid it; that he did not remember who paid the rent in January, 1943; that he did not remember having a conversation with Mr. or Mrs. Trojan in January or February, 1943 relative to the Matteis' vacating the first floor apartment; that in conversations with the landlords, they told him that they (the Matteis') could stay there as long as they wished; that they never told him to get out; that Mr. Trojan did not tell him that the Trojans wished to move from the basement to the first floor apartment; that during the first part of March, 1943 defendant told him (plaintiff) that she was going to look for another flat; that he objected; and that "evidently" she found another flat. Asked as to whether he was ever in the flat she moved to, he answered in the affirmative. Asked as to whether he was there on March 10, 1943, he answered: "No." Asked as to whether he had any knowledge prior to the evening of March 10, 1943 that his wife was moving, he answered: "Yes." Asked as to where he acquired that knowledge, he answered: "From her." Asked as to whether he did not help carry "the stuff" out to the moving van, he answered that he did not see

Cicero, Illinois. At the time of their marriage this property was owned by Anton Trojan and Ella Trojan, husband and wife, who lived in the basement apartment. Following the marriage of Plaintiff and defendant, they returned to Cicero, where they lived in the first floor apartment at 8101 South 61st Avenue, formerly occupied by defendant and her mother. They lived there until Wednesday, March 10, 1943. No children were born of the marriage. Plaintiff was employed as a clerk in a "hand book." In 1943 defendant was employed in a defense plant located close to her home. Plaintiff testified that sometimes he paid the rent to the Trojans and sometimes his wife paid it; that he did not remember who paid the rent in January, 1943; that he did not remember having a conversation with Mr. or Mrs. Trojan in January or February, 1943 relative to the Matteia's vacating the first floor apartment; that in conversations with the landlords, they told him that they (the Matteia's) could stay there as long as they wished; that they never told him to get out; that Mr. Trojan did not tell him that the Trojans wished to move from the basement to the first floor apartment; that during the first part of March, 1943 defendant told him (Plaintiff) that she was going to look for another flat; that he objected; and that "obviously" she found another flat. Asked as to whether he was ever in the flat she moved to, he answered in the affirmative. Asked as to whether he was there on March 10, 1943, he answered: "No." Asked as to whether he had any knowledge prior to the evening of March 10, 1943 that his wife was moving, he answered: "Yes." Asked as to where he acquired that knowledge, he answered: "From her." Asked as to whether he did not help carry "the stuff" out to the moving van, he answered that he did not see

a moving van. Asked as to whether he did not help her move her clothes from their flat to the flat to which she moved, he answered: "I never helped carry no clothes. The only thing is, she was going to move and I asked her not to move, and she had some old rubbish there. I don't know what it was, so I says, 'As long as you are going to move, I will help you,' but I never once told her to move." He said he moved "a couple of bushel baskets" of "the stuff" from one place to the other in his car; that he didn't remember helping her to carry her clothes to the new flat. He denied helping her after she got to the new flat; denied connecting the gas stove for her; denied seeing a Mrs. Dunlap at the other flat, and then stated that he didn't remember and that if he did see her, he would not know her. Asked as to what conversation he had with his wife when he left the new flat on March 10, 1943, he answered: "Well, as long as she is leaving, I was going to ask her for a divorce. I told her if she was to move, I was going to get a divorce." He testified further that he moved his clothing out of their former apartment the second or third day after her "things" were moved and that he then went to live with his mother in Melrose Park. He denied that he requested her "to pick out a flat" for him; that he stated that he told her not to move and that they were satisfied where they were. He testified that the parties agreed to call on attorney James C. Soper in Cicero, with whom both of them were acquainted, for the purpose of making a division of money credited to them in a joint bank account; that the amount on deposit was \$1,300; that Mr. Soper's fee was paid out of this account and the balance divided evenly between them; that since March 10, 1943 he has not contributed any money to her support; that since March 10, 1943 he "never" told her that he had a home for her; that since then he has "never" asked her to live with him; that he asked her

a moving van. Asked as to whether he did not help her move her clothes from their flat to the flat to which she moved, he answered: "I never helped carry no clothes. The only thing is, she was going to move and I asked her not to move, and she had some old rubbish there. I don't know what it was, so I says, 'As long as you are going to move, I will help you,' but I never once told her to move." He said he moved "a couple of bushel baskets" of "the stuff" from one place to the other in his car; that he didn't remember helping her to carry her clothes to the new flat. He denied helping her after she got to the new flat; denied connecting the gas stove for her; denied seeing a Mrs. Daniel at the other flat, and then stated that he didn't remember and that if he did see her, he would not know her. Asked as to what conversation he had with his wife when he left the new flat on March 10, 1943, he answered: "Well, as long as she is leaving, I was going to ask her for a divorce. I told her if she was to move, I was going to get a divorce. He testified further that he moved his clothing out of their former apartment the second or third day after her "things" were moved and that he then went to live with his mother in Monroe Park. He denied that he requested her "to pick out a flat" for him; that he stated that he told her not to move and that they were satisfied where they were. He testified that the parties agreed to call on attorney James C. Boper in Cicero, with whom both of them were acquainted, for the purpose of making a division of money credited to them in a joint bank account; that the amount on deposit was \$1,500; that Mr. Boper's fee was paid out of this account and the balance divided evenly between them; that since March 10, 1943 he has not contributed any money to her support; that since March 10, 1943 he "never" told her that he had a home for her; that since then he has "never" asked her to live with him; that he asked her

to give him a divorce; that since that date the only conversation that he had with her was in requesting her to give him a divorce; and that he never asked her to come back and live with him.

Ella Trojan, who, with her husband, owned and lived in the basement flat at 2101 South 61st Avenue, Cicero, called by plaintiff, testified that plaintiff and defendant occupied the first floor apartment. In answer to the question: "And they moved their furniture out of the apartment that they occupied?" she answered: "They did." Asked as to whether any property was left after the parties moved, she said she didn't go upstairs, and that plaintiff brought the key. She did not know whether plaintiff or defendant had called the moving van. Witness knew defendant prior to her marriage to plaintiff and knew plaintiff from the time of the marriage in 1939. They lived in her building continuously from their marriage until March 10, 1943. Mrs. Trojan testified further that sometimes plaintiff paid the rent and sometimes defendant paid the rent; that prior to March 10, 1943 she told defendant that they (the Trojans) wished to move to the flat on the first floor; that at the time plaintiff returned the key a day or two after March 10, 1943, she (Mrs. Trojan) gave him back some of the rent he paid for the month of March; that they (the Trojans) moved into the first floor flat about three months after March 10, 1943; and that the reason for the delay in moving was that they had to do certain remodeling.

Anton Trojan, one of the joint owners of the building in which plaintiff and defendant lived, called by defendant, testified that he was subpoenaed by plaintiff; that in 1939, following the marriage of plaintiff and defendant, he (witness) told plaintiff that they (the Trojans) wanted to live in the basement; that later Mrs. Trojan got sick; that he did not like to live in the basement;

to give him a divorce; that since that date the only conversation that he had with her was in requesting her to give him a divorce; and that he never asked her to come back and live with him.

Ella Trojan, who, with her husband, owned and lived in the basement flat at 2101 South East Avenue, Chicago, called by plaintiff, testified that plaintiff and defendant occupied the first floor apartment. In answer to the question: "And they moved their furniture out of the apartment that they occupied?" she answered: "They did." Asked as to whether any property was left after the parties moved, she said she didn't go upstairs, and that plaintiff brought the key. She did not know whether plaintiff or defendant had called the moving van. Witness knew defendant prior to her marriage to plaintiff and knew plaintiff from the time of the marriage in 1939. They lived in her building continuously from their marriage until March 10, 1943. Mrs. Trojan testified further that sometimes plaintiff paid the rent and sometimes defendant paid the rent; that prior to March 10, 1943 she told defendant that they (the Trojans) wished to move to the flat on the first floor; that at the time plaintiff returned the key a day or two after March 10, 1943, she (Mrs. Trojan) gave him back some of the rent he paid for the month of March; that they (the Trojans) moved into the first floor flat about three months after March 10, 1943; and that the reason for the delay in moving was that they had to do certain remodeling.

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that he told plaintiff that he would like to have the flat for himself; that after the furniture was moved on March 10, 1943, either the same evening or the next evening plaintiff returned the keys, at which time part of the March rent was returned to plaintiff; that after the first floor flat was remodeled witness and his wife moved into it. At this juncture the attorneys for the parties stipulated that if two named persons were called and sworn as witnesses, they would testify that they were acquainted with plaintiff and defendant; that they separated on March 10, 1943 and that they had been living separate and apart since then. Defendant testified that she treated plaintiff "as a dutiful wife should"; that there were no arguments between them; that sometime in February her husband told her that "we must vacate the flat"; that he told her that was what he was told "by the landlord"; that she went out and looked for a flat; that she found one at 1801 Lombard Avenue, Cicero, Illinois, which was three or four blocks from where they were living; that she told him she had located new quarters and that she made arrangements for moving to the new flat; that she called a van and that the van came on March 10, 1943; that her husband helped her with the packing; that he helped her carry "some things" out, and that he placed them in his automobile; that the movers were there about 9:00 a.m.; that her husband was home at the time; that she did not go to work until 11:00 p.m.; that her husband helped her to get her clothes to the new flat; that he put them in his car; that he then "drove them over;" that he went into the flat with her; that on viewing the flat he remarked: "Of all the dumps I have ever seen, this is the worst;" that he connected the gas range in the new flat; that he was in the new flat between 2 and 3 o'clock in the afternoon before he left for

that he told plaintiff that he would like to have the flat for himself; that after the furniture was moved on March 10, 1943, either the same evening or the next evening plaintiff returned the keys, at which time part of the March rent was returned to plaintiff; that after the first floor flat was remodeled witness and his wife moved into it. At this juncture the attorneys for the parties stipulated that if two named persons were called and sworn as witnesses, they would testify that they were acquainted with plaintiff and defendant; that they separated on March 10, 1943 and that they had been living separate and apart since then. Defendant testified that she treated plaintiff "as a dutiful wife should"; that there were no arguments between them; that sometime in February her husband told her that "we must vacate the flat"; that he told her that was what he was told "by the landlord"; that she went out and looked for a flat; that she found one at 1801 Lombard Avenue, Cicero, Illinois, which was three or four blocks from where they were living; that she told him she had located new quarters and that she made arrangements for moving to the new flat; that she called a van and that the van came on March 10, 1943; that her husband helped her with the packing; that he helped her carry "some things" out, and that he placed them in his automobile; that the movers were there about 9:00 a.m.; that her husband was home at the time; that she did not go to work until 11:00 p.m.; that her husband helped her to get her clothes to the new flat; that he put them in his car; that he then "drove them over"; that he went into the flat with her; that on viewing the flat he remarked: "Of all the dumps I have ever seen, this is the worst"; that he connected the gas range in the new flat; that he was in the new flat between 2 and 3 o'clock in the afternoon before he left for

his work; that he came back two or three weeks later after she was settled; that he still didn't like the flat; that he did not request her to live with him at any other place; that since the separation she saw him two or three times; and that she went to Attorney Soper's office at the request of her husband. On cross-examination, questioned as to whether she asked her husband to go and look at the new flat before the moving day, she answered in the affirmative, and said he replied: "Time enough when we move." Further on cross-examination she testified that on March 10, 1943 he told her he was moving to a hotel. She denied that he told her that he did not want to move. She stated that prior to March 10, 1943 a complaint for divorce was filed by her.

Mrs. Dunlap testified that she was well acquainted with defendant; that she was not acquainted with plaintiff, but knew him; that on March 10, 1943 she saw plaintiff carrying baskets out; and that on that day she saw him connecting the stove in the new flat. Plaintiff, recalled to the stand, denied that he connected the gas stove in the new apartment; stated that the moving van was at the old place around noon time; and that about 1:00 p.m. he helped his wife carry bundles out to the car. On direct examination, in answer to a question as to whether he took his wife over to the new place, he answered: "I never took her over there." On cross-examination, in answer to a question as to whether he took her clothes over there, he replied: "Took some things over there, not that day - yes, that day, that is right."

Over the objection of defendant the court received as evidence a note which she admitted sending to him shortly after March 10, 1943, reading: "John: You may have all - everything I received from you is yours, including all furniture, money, etc. Please, I want it that way. Your wish is my wish so that shouldn't

his work; that he came back two or three weeks later after she was settled; that he still didn't like the flat; that he did not request her to live with him at any other place; that since the separation she saw him two or three times; and that she went to Attorney Rogers' office at the request of her husband. On cross-examination, questioned as to whether she asked her husband to go and look at the new flat before the moving day, she answered in the affirmative, and said he replied: "Time enough when we move." Further on cross-examination she testified that on March 10, 1943 he told her he was moving to a hotel. She denied that he told her that he did not want to move. She stated that prior to March 10, 1943 a complaint for divorce was filed by her.

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Over the objection of defendant the court received as evidence a note which she admitted sending to him shortly after March 10, 1943, reading: "John: You may have all - everything I received from you is yours, including all furniture, money, etc. Please, I want it that way. Your wish is my wish so that shouldn't

be so hard. Goodbye and loads of luck. Edith." It appears from the statement of one of the attorneys that the divorce complaint filed by defendant prior to March 10, 1943 was dismissed. During the hearing defendant stated that she did not want a divorce and that she wanted him back. The chancellor asked plaintiff ^{if} he wanted "the lady back" and he answered in the negative.

Defendant contends that the decree is contrary to the law and to the manifest weight of the evidence. Plaintiff, to establish the charge of desertion, was required to prove that defendant had absented herself and remained away from him without any reasonable cause and against his will for a period of one year. If married parties separate by mutual consent, there is no such legal desertion on the part of either as constitutes grounds for divorce. Where the plaintiff in a divorce proceeding has, either expressly or impliedly, consented to the original separation or its continuance, and has not revoked such consent, he is not entitled to a divorce for desertion. Larimore v. Larimore, 299 Ill. App. 547. From the time of their marriage until March 10, 1943, the parties lived at 2101 South 61st Avenue, Cicero, where defendant had lived with her mother prior to her marriage. During the time the parties lived together as husband and wife they treated each other with courtesy and respect. There is nothing in the evidence to show that the parties at any time had a quarrel or disagreement, or that either had a complaint to make against the other as to conduct or treatment. The building in which they lived was owned by Anton and Ella Trojan, who occupied the basement apartment. Plaintiff and defendant occupied the apartment on the first floor. The relationship between the parties and their landlords was friendly. At the beginning of the tenancy the Trojans desired to

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live in the basement apartment. In February, 1943 Mrs. Trojan became ill and her husband became dissatisfied with their apartment. Mr. Trojan testified that he told plaintiff that they (the Trojans) would like to have the first floor flat for themselves. About the same time Mrs. Trojan conveyed the same request to defendant. Defendant testified that during the same month she informed plaintiff that they must vacate the flat because of the request so to do by the landlords. She located a flat at 1801 Lombard Avenue, Cicero, about four blocks from where they were living. She testified that she asked plaintiff to come over and look at it and that he said there would be time enough to look at it when they moved. Plaintiff made no effort to obtain another dwelling place. Defendant made the arrangements for moving. Plaintiff helped her with the packing and carried out some things in bushel baskets, which he put in his car, and also drove defendant to the new flat. He told her that "as long as you are going to move, I will help you." He also told her that as long as she was leaving he was going to ask for a divorce. When he returned the keys to the Trojans they gave him back part of the March rent. He then went to live with his mother.

The burden was on plaintiff to prove his case by a preponderance of the evidence. The evidence shows that the Trojans wanted the first floor apartment, then occupied by plaintiff and defendant. Apparently, because of the Friendship between the landlords and the tenants, there was a willingness on the part of the tenants to comply with the request. The evidence strongly supports defendant's contention that with plaintiff's consent she rented another apartment in the vicinity and moved there. He helped her in the moving and then declined to live with her. He did not offer to make another home for her. In fact, he testified that their only conversation thereafter related to his requests for a divorce. The evidence in this case

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does not establish that at the time of the separation defendant intended to sever the family relationship, nor does it appear that the separation was against the will of plaintiff. Defendant did not move with the intent to break up the marital relationship. She moved because the landlord asked the parties to vacate the apartment. Defendant cannot be charged with desertion because she did not wait to be evicted following a judgment of a court. On the day of the moving plaintiff asked defendant for a divorce and stated that he was going to get a divorce.

In endeavoring to sustain the decree plaintiff relies strongly on the fact that defendant filed a complaint for divorce against him prior to March 10, 1943, and on the note which she sent him shortly after the separation. From her testimony it did not appear that she knew much about the divorce complaint which she filed.. The complaint was dismissed. The record is silent as to why she filed the complaint for divorce and as to why it was dismissed. The fact that she filed a complaint for divorce and then dismissed it, does not lend support to plaintiff's case. If the filing of the complaint for divorce would tend to prove an intent on her part to desert him, then the dismissal of the same complaint would tend to show that she did not want a divorce. The ground asserted in the complaint which she filed is not stated. The note which defendant sent to plaintiff was admissible for consideration by the court. It will be observed that the note states that "your wish is my wish." At that time she knew that he refused to live with her and that he did not want her to oppose a divorce. The fact that she agreed to a division of their joint bank account does not support plaintiff's case. He admitted that they went to Mr. Soper's

does not establish that at the time of the separation defendant

intended to sever the family relationship, nor does it appear that the separation was against the will of plaintiff. Defendant did not move with the intent to break up the marital relationship. She moved because the landlord asked the parties to vacate the apartment. Defendant cannot be charged with desertion because she did not wait to be evicted following a judgment of a court. On the day of the moving plaintiff asked defendant for a divorce and stated that he was going to get a divorce.

In endeavoring to sustain the decree plaintiff relies strongly on the fact that defendant filed a complaint for divorce against him prior to March 10, 1943, and on the note which she sent him shortly after the separation. From her testimony it did not appear that she knew much about the divorce complaint which she filed. The complaint was dismissed. The record is silent as to why she filed the complaint for divorce and as to why it was dismissed. The fact that she filed a complaint for divorce and then dismissed it, does not lend support to plaintiff's case. If the filing of the complaint for divorce would tend to prove an intent on her part to desert him, then the dismissal of the same complaint would tend to show that she did not want a divorce. The record asserted in the complaint which she filed is not stated. The note which defendant sent to plaintiff was admissible for consideration by the court. It will be observed that the note states that "your wish is my wish." At that time she knew that he refused to live with her and that he did not want her to oppose a divorce. The fact that she agreed to a division of their joint bank account does not support plaintiff's case. He admitted that they went to Mr. Goper's

office by agreement. Plaintiff has failed to prove that defendant wilfully deserted him without any reasonable cause. We find that the decree is against the manifest weight of the evidence. The decree of the Superior Court of Cook County is reversed and the cause remanded with directions to proceed in a manner not inconsistent with this opinion.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY, P.J. AND LEWE, J. CONCUR.

office by agreement. Plaintiff has failed to prove that defendant willfully asserted him without any reasonable cause. We find that the decree is against the manifest weight of the evidence. The decree of the Superior Court of Cook County is reversed and the cause remanded with directions to proceed in a manner not inconsistent with this opinion.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILLY, P. J. AND LEAH, J. CONCUR.

43155

MARY F. BENTLEY, Administratrix)
of the Estate of CHARLES E. LINE,)
SR., Deceased,)

Appellee,)

v.)

MERCHANTS MATRIX CUT SYNDICATE,)
INC.,)

Appellant.)

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3236 589

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action at law for breach of a written contract between Charles E. Line, Sr. and defendant Merchants Matrix Cut Syndicate, Inc., a corporation, which provided that defendant would pay Line \$200 monthly if he refrained from engaging in a competing business for a period of five years within a radius of five hundred miles from the city of Chicago, and that the agreement shall be extended for a further period of five years if defendant "be earning in excess of \$5,000 per year." Line died on December 24, 1943. Upon his death his administratrix was substituted as plaintiff. At the close of all the evidence defendant made a motion for a directed verdict, which was denied. There was a jury trial and a directed verdict for plaintiff, and judgment in plaintiff's favor for \$2,270. Defendant appeals.

The essential facts are uncontroverted. For many years Charles E. Line, Sr., was employed by the defendant, a manufacturer of printer's mats and matrices. On January 3, 1938, Line and the defendant entered into a written contract which recited that Line "is now incapacitated and has now reached an age where it is difficult for him to further carry on the duties incident to his work, and has requested that he be given a pension." Under

MARY F. BENTLEY, Administratrix
of the Estate of CHARLES E. LINE,
SR., Deceased,

Appellee,

v.

MERCHANTS MATRIX CUT SYNDICATE,
INC.,

Appellant.

CIRCUIT COURT

COOK COUNTY.

APPEAL FROM

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engaging in a competing business for a period of five years within

a radius of five hundred miles from the city of Chicago, and

that the agreement shall be extended for a further period of five

years if defendant "be earning in excess of \$5,000 per year."

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was substituted as plaintiff. At the close of all the evidence

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Charles E. Line, Sr., was employed by the defendant, a manufacturer

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the defendant entered into a written contract which recited that

Line "is now incapacitated and has now reached an age where it

is difficult for him to further carry on the duties incident to

his work, and has requested that he be given a pension." Under

3531 A. 589

the terms of the contract, the defendant agreed to pay Line \$200 monthly commencing January 31, 1938, until December 31, 1942, provided he did not interfere directly or indirectly with the business of the company within a radius of 500 miles of the city of Chicago and did not divulge to anyone trade secrets or information relative to the business or its customers, such as price-lists, correspondence and records. Pertinent portions of Section 7 of the agreement further provided "that in the event the said Charles E. Line Sr., has fully complied with the provisions thereof on his part to be performed and has refrained from doing the things which he has agreed to refrain from doing, that the company shall, at the end of the five-year period hereinabove provided, be earning an amount in excess of \$5,000 per year, then this agreement shall be continued and extended for a further period of five years..... It is understood that the salary of the president of the company during such period of extension shall, for the purpose of computing the earnings, be considered to be an expense of the business in an amount not greater than the present amount of the president's salary..... That the payments to said Charles E. Line, Sr., of \$200 per month shall, in any event, cease with the death of the said Charles E. Line, Sr."

Defendant's books of account showed, for the year ending December 31, 1942, total income from sales was \$186,440.14, and net profit \$244.14.

The record discloses that J. Bruce Allen, president of the defendant company, and his wife owned 55 and 45 per cent, respectively, of the stock of the company; that Allen also owned a fishing lodge in northern Wisconsin and 356 acres near Beardstown,

the terms of the contract, the defendant agreed to pay Line \$200 monthly commencing January 31, 1933, until December 31, 1942, provided he did not interfere directly or indirectly with the business of the company within a radius of 500 miles of the city of Chicago and did not divulge to anyone trade secrets or information relative to the business or its customers, such as price-lists, correspondence and records. Pertinent portions of section 7 of the agreement further provided "that in the event the said Charles E. Line Sr., has fully complied with the provisions thereof on his part to be performed and has refrained from doing the things which he has agreed to refrain from doing, . . . that the company shall, at the end of the five-year period heretofore provided, be earning an amount in excess of \$5,000 per year, then this agreement shall be continued and extended for a further period of five years. . . . It is understood that the salary of the president of the company during such period of extension shall, for the purpose of computing the earnings, be considered to be an expense of the business in an amount not greater than the present amount of the president's salary. . . . That the payments to said Charles E. Line, Sr., of \$200 per month shall, in any event, cease with the death of the said Charles E. Line, Sr."

Defendant's books of account showed, for the year ending December 31, 1942, total income from sales was \$186,440.14, and net profit \$24,141.14.

The record discloses that J. Bruce Allen, president of the defendant company, and his wife owned 55 and 45 per cent, respectively, of the stock of the company; that Allen also owned a fishing lodge in northern Wisconsin and 256 acres near Escanaba,

Illinois, which was used as a duck-shooting ground; that he leased the hunting lodge to the defendant company at an annual rental of \$1500; that he charged to defendant company groceries consumed there, wages of a caretaker, use of an automobile, and railroad traveling expenses for himself and his wife to the fishing lodge and duck-shooting grounds, as well as many other items used at these resorts; that, in addition to his monthly salary of \$1600 as president, Allen received a bonus of \$7,122.50 for services rendered during 1942, without any prior agreement with respect to the payment of a bonus.

Plaintiff's theory is that the defendant company was "earning an amount in excess of \$5,000 per year" at the end of the first five years, thus renewing the contract for a second five-year period. Defendant contends that the parties intended that the word "earnings" meant "net profits," and that the deductions for expenditures shown to have been made in 1942 were usual and customary in the business and known by Line to be such.

In their brief, counsel for defendant argue that the fishing lodge and duck grounds were maintained for the use of customers of the defendant corporation, and that, therefore, all moneys which Allen expended were properly charged as expenses of the business. There was evidence that he did entertain some of his customers in this fashion and that Line knew of it, and that he also knew that Allen had been receiving a bonus. Whether Line knew of these expenditures or bonus payments to Allen, or whether they were justified as proper expenditures by defendant in promoting and holding its business, we think is immaterial, since the contract on its face purports to be a complete expression of the whole agreement, and by the introduction of parol evidence defendant was, in effect, attempting to establish a different contract from that

Illinois, which was used as a duck-shooting ground; that he leased the hunting lodge to the defendant company at an annual rental of \$1500; that he charged to defendant company groceries consumed there, wages of a caretaker, use of an automobile, and railroad traveling expenses for himself and his wife to the fishing lodge and duck-shooting grounds, as well as many other items used at these resorts; that, in addition to his monthly salary of \$1800 as president, Allen received a bonus of \$7,122.50 for services rendered during 1942, without any prior agreement with respect to the payment of a bonus.

Plaintiff's theory is that the defendant company was "earning an amount in excess of \$5,000 per year" at the end of the first five years, thus renewing the contract for a second five-year period. Defendant contends that the parties intended that the word "earnings" meant "net profits," and that the

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expressed in the agreement. (Green v. Ashland State Bank, 346 Ill. 174, 182.) The intention of the parties to a contract is not determined by evidence aliunde, but by the language of the contract itself. (Noll Co. v. Sparks Milling Co., 304 Ill. App. 624.) To the same effect see Domeyer v. O'Connell, 364 Ill. 467 and Engelstein v. Mintz, 345 Ill. 48. As pointed out in the Engelstein case, at page 60: "Courts may not, because a more equitable result might be reached thereby, construe into a contract provisions that are not there."

Since the contract was prepared by the secretary of the defendant company it cannot complain because the construction is favorable to the plaintiff. (Massie v. Belford, 68 Ill. 290; McClenathan v. Davis, 243 Ill. 87.)

The word "earnings" in its general acceptance does not mean net earnings, unless qualified in some way. (Springfield Coal Co. v. Industrial Com., 291 Ill. 408, 412; State v. United Electric Light & Water Co., 97 Atl. 857, 859; Smith v. Bates Machine Co., 182 Ill. 166.) In Smith v. Bates substantially the same arguments were advanced as in the case at bar. There the court said, at page 170:

"If, as is now contended, the intention was to limit their liability upon the order to such earnings as might remain after the payment of all expenses of the work, it would have been very easy and most natural that such intention should have been expressed in the writing, and it seems to us that to permit the construction now insisted upon to be placed upon the acceptance would be clearly violative of the rule that the terms of a written agreement cannot be varied or changed by parol."

During the first five-year period of the contract, defendant made monthly payments regularly to Line and, so far as the evidence shows, he complied with all its terms. While he was receiving these payments, Line had no occasion to complain about the expenditures or the payment of bonuses which it is admitted aggregate a sum far in excess of \$5,000. It should be noted that

expressed in the agreement. (Green v. Aspland State Bank, 348 Ill. 174, 182.) The intention of the parties to a contract is not determined by evidence alibis, but by the language of the contract itself. (Noel Co. v. Sparks Milling Co., 304 Ill. App. 824.) To the same effect see Rowley v. O'Connell, 384 Ill. 457 and Engelstein v. Mintz, 345 Ill. 48. As pointed out in the Engelstein case, at page 60: "Courts may not, because a more equitable result might be reached thereby, construe into a contract provisions that are not there."

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the contract expressly provides that the salary of the president of the company during such period of extension "for the purpose of computing earnings" shall not be greater than it was when the contract was executed. We think the absence of any reference to a bonus, coupled with the fact that it was granted by way of compensation for services already rendered, precludes the defendant from charging it as an expense of the defendant's business. (40 A.L.R. 1432.)

The contract in question is neither ambiguous nor incomplete and, therefore, the legal effect of it presented a question of law for the court to determine. (Schneider v. Neubert, 308 Ill. 40, 43; Knowles F. & M. Co. v. National Plate Glass Co., 301 Ill. App. 128, 167; McConnaughey v. Gage, 252 Ill. App. 17.)

For the reasons stated, the trial court properly directed the jury to enter a verdict for the plaintiff, and the judgment entered thereon is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

the contract expressly provides that the salary of the president of the company during each period of extension "for the purpose of computing earnings" shall not be greater than it was when the contract was executed. We think the absence of any reference to a bonus, coupled with the fact that it was granted by way of compensation for services already rendered, precludes the defendant from charging it as an expense of the defendant's business. (40

A.I.R. 143.)

The contract in question is neither ambiguous nor incomplete and, therefore, the legal effect of it presented a question of law for the court to determine. (*Schneider v. Newbert*, 308 Ill. 40, 43; *Knowles v. M. Co. v. National Plate Glass Co.*, 301 Ill. App. 126, 127; *McGonigley v. Gane*, 282 Ill. App. 17.) For the reasons stated, the trial court properly directed the jury to enter a verdict for the plaintiff, and the judgment entered thereon is affirmed.

JUDGMENT AFFIRMED.

KILLY, P.J. AND BURKE, J. CONCUR.

43477

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

MARY ROBERTSON,

Plaintiff in Error.

WRIT OF ERROR TO

MUNICIPAL COURT

OF CHICAGO.

328 I.A. 590

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

An information was filed in the Municipal Court of Chicago, charging the defendant, Mary Robertson, with the statutory crime of solicitation to prostitution under the provisions of section 163, chapter 38, of the Illinois Revised Statutes. At the trial defendant pleaded not guilty and waived a trial by jury. The court found that the defendant "did then and there unlawfully, willfully and wickedly solicit to prostitution at 2740 Sheffield Avenue in the City of Chicago, County of Cook and State of Illinois, in violation of section 163, chapter 38, Illinois Revised Statutes of 1941." The foregoing quoted language is the same as the charge in the information. Judgment was entered upon the verdict and the defendant was "sentenced to confinement at labor in the House of Correction of the City of Chicago for the term of sixty days."

The pertinent part of the statute involved reads as follows: "Any male or female person who shall solicit to prostitution in any street, alley, park, or other place in any city shall be fined not exceeding two hundred dollars or imprisoned in the County Jail or House of Correction for a period of not more than one year or both."

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

MARY ROBERTSON,

Plaintiff in Error.

WIT OF ERROR TO

MUNICIPAL COURT

OF CHICAGO.

323 I.A. 590

MR. JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

An information was filed in the Municipal Court of

Chicago, charging the defendant, Mary Robertson, with the

statutory crime of solicitation to prostitution under the pro-

visions of section 183, chapter 38, of the Illinois Revised

Statutes. At the trial defendant pleaded not guilty and waived

a trial by jury. The court found that the defendant "did then

and there unlawfully, wilfully and wickedly solicit to prostitution

at 2740 Sheffield Avenue in the City of Chicago, County of Cook

and State of Illinois, in violation of section 183, chapter 38,

Illinois Revised Statutes of 1941." The foregoing quoted language

is the same as the charge in the information. Judgment was

entered upon the verdict and the defendant was "sentenced to

confinement at labor in the House of Correction of the City of

Chicago . . . for the term of sixty days."

The pertinent part of the statute involved reads as

follows: "Any male or female person who shall solicit to

prostitution in any street, alley, park, or other place in any

city . . . shall be fined not exceeding two hundred dollars or

imprisoned in the County Jail or House of Correction for a period

of not more than one year or both."

Defendant's principal contentions are (1) that the information is void because it does not charge that the offense was committed in a street, alley, park or other public place, and (2) does not charge facts sufficient to state the crime specified.

The People maintain in their argument that the information contains all the necessary allegations to constitute the crime charged.

Upon a reading of the statute, it is manifest that this section applies only to persons who solicit to prostitution in public. Whether 2740 Sheffield Avenue is a public place or a private home cannot be determined from the language of the information. In their brief, The People urge that the word "at" means nearness or proximity, citing Kitchel v. Gallagher, 270 Pac. 488, and Smeltzer v. Atlanta Coach Co., 160 S. E. 685. In these cases the word "at" was used with reference to street intersections. They also cite Clark County Fiscal Court v. Powell County Fiscal Court, 2 S. W. (2d) 1039. This case involved the location of a bridge site at one of two fords. The facts, as well as the context, in which the word "at" appears in the foregoing cases, are dissimilar, and therefore the cases do not support the People's position.

In the City of Chicago, the use of street numbers (a common practice in deeds or leases) is to designate private property only. Hence, whether the act charged in the information was committed upon a public thoroughfare or upon private property is not clear.

The information also fails to state the name of the person solicited. In the People v. Rice, 383 Ill. 584, at 588, the court said:

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In the City of Chicago, the use of street numbers (a common practice in deeds or leases) is to designate private property only. Hence, whether the act charged in the information was committed upon a public thoroughfare or upon private property is not clear.

The information also fails to state the name of the person solicited. In the People v. Rice, 382 Ill. 524, at 528,

the court said:

"Further considering the sufficiency of the separate counts of the indictments, it will be noted that each count one alleges solicitation to prostitution 'upon the public streets or other place of the City of Champaign.' It does not allege the name of a person or persons solicited nor describe the streets or place. The rule is well settled that an indictment for a statutory offense, especially when the offense is a misdemeanor, charging the facts constituting the crime in the words of the statute, and containing averments as to time, place, persons and other circumstances to identify the particular act charged, is good as a pleading and justifies putting the defendant on trial.

"Section 9 of the Bill of Rights provides that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him. The purpose of this guaranty is to secure to him such specific designation of the offense laid to his charge as will enable him to prepare fully his defense and to plead the judgment in bar of a subsequent prosecution for the same offense." (*Italics ours.*)

To the same effect see The People v. Chiafreddo, 381 Ill. 214; The People v. Cook County Distributors, 321 Ill. App. 394, at 398.

In the instant case the information is not only vague and indefinite as to the place where the offense was committed, but also fails to name the person solicited.

For the reasons stated, the judgment is reversed.

JUDGMENT REVERSED.

KILEY, P.J. AND BURKE, J. CONCUR.

"Further considering the sufficiency of the separate counts of the indictment, it will be noted that each count alleges solicitation to prostitution 'upon the public streets or other place of the City of Chicago.' It does not allege the name of a person or persons solicited nor describe the streets or place. The wife is well settled that an indictment for a statutory offense, especially when the offense is a misdemeanor, charging the facts constituting the crime in the words of the statute, and containing averments as to time, place, persons and other circumstances to identify the particular act charged, is good as a pleading and justifies putting the defendant on trial. "Section 9 of the Bill of Rights provides that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him. The purpose of this guaranty is to secure to him such specific designation of the offense laid to his charge as will enable him to prepare fully his defense and to plead the judgment in bar of a subsequent prosecution for the same offense." (Litchner case.)

To the same effect see The People v. Chalmers, 391 Ill. 214; The People v. Cook County Distributors, 391 Ill. App. 384, at 398.

In the instant case the information is not only vague and indefinite as to the place where the offense was committed, but also fails to name the person solicited.

For the reasons stated, the judgment is reversed.

JUDGMENT REVERSED.

KILBY, P. J. AND BREWER, J. CONCUR.

43592

In the Matter of KATHLEEN RICHARDS,
a Dependent Girl, PEOPLE OF THE
STATE OF ILLINOIS,

Petitioner and Appellee,

v.

EMORY HERRON,

Respondent and Appellant.

APPEAL FROM

CIRCUIT (JUVENILE)

COURT,

COOK COUNTY.

328 P.A. 591

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal, respondent, Emory Herron, seeks to reverse a final supplemental decree of the Circuit (Juvenile) Court denying the counterclaim of respondent praying for the custody and control of his illegitimate child under Section 13 of Chapter 17, Ill. Rev. Stats. 1943. Respondent appealed to the Supreme Court, where the cause was transferred to this court.

On June 5, 1940, Irene McMahon, an assistant probation officer of the Juvenile Court, filed a petition in that court praying, inter alia, that Harry Hill, chief probation officer of the Juvenile Court, be appointed guardian of Kathleen Richards, child of Marion Richards. On January 27, 1941, a decree was entered in conformity with the prayer of the petition. Afterward, on May 12, 1942, Margaret C. Lyman filed a supplementary petition similar in content to the one filed June 5, 1940 by Irene McMahon. The gist of the supplementary petition is that Kathleen Richards, a female child, was born on February 14, 1940; that the child is in the custody or control of Mr. and Mrs. Charles Brady; that the alleged father of Kathleen Richards is Emory Herron; that the mother, Marion Richards, is wholly unable to care for, protect, educate, control and discipline her child, by reason whereof she has become and is a dependent; that the mother consents that a guardian over the person of the child be appointed, and that the

APPEAL FROM

CIRCUIT (JUVENILE)

COUNT

COOK COUNTY

328 YA 591

In the Matter of KATHLEEN RICHARDS,
Dependent Girl, People of the
State of Illinois,

Petitioner and Appellee,

v.

EMORY HERRON,

Respondent and Appellant.

MR. JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

By this appeal, respondent, Emory Herron, seeks to

reverse a final supplemental decree of the Circuit (Juvenile)

Court denying the counterclaim of respondent praying for the

custody and control of his illegitimate child under section 13

of Chapter IV, Ill. Rev. Stat., 1943. Respondent appealed to

the Appellate Court, where the cause was transferred to this court.

On June 5, 1940, Irene McMahon, an assistant probation

officer of the Juvenile Court, filed a petition in that court

praying, inter alia, that Harry Hill, chief probation officer of

the Juvenile Court, be appointed guardian of Kathleen Richards,

child of Marion Richards. On January 27, 1941, a decree was

entered in conformity with the prayer of the petition. Afterwards,

on May 12, 1942, Margaret G. Lyman filed a supplementary petition

similar in content to the one filed June 5, 1940 by Irene McMahon.

The last of the supplementary petition is that Kathleen Richards,

a female child, was born on February 14, 1940; that the child

is in the custody or control of Mr. and Mrs. Charles Brady; that

the alleged father of Kathleen Richards is Emory Herron; that the

mother, Marion Richards, is wholly unable to care for, protect,

educate, control and discipline her child, by reason whereof she

has become and is a dependent; that the mother consents that a

guardian over the person of the child be appointed, and that the

guardian be authorized and empowered to assent to the legal adoption of said child. The concluding paragraph prays that some suitable person be appointed guardian over the person of Kathleen Richards and authorized and empowered as such guardian to assent to her legal adoption.

Respondent's answer avers that in a cause entitled People of the State of Illinois ex rel. Marion Richards v. Emory Herron, the Municipal Court of Chicago, on December 11, 1940, entered judgment finding respondent to be the putative father of said Kathleen Richards; that under the law of the State of Illinois commonly referred to as the Bastardy Act, Chapter 17, Smith-Hurd Annotated Statutes, the respondent is entitled to the custody and control of Kathleen Richards; that respondent is gainfully employed and earns sufficient wages to provide suitable care, maintenance, education and guardianship of Kathleen Richards; that he is a married man living with his wife in a respectable neighborhood in the City of Chicago; that his wife has expressed willingness to receive the child in their home as a member of the family of the respondent; that the respondent does not consent to the adoption of the child by Mr. and Mrs. Charles Brady, Respondent's counterclaim concludes with a prayer that the care, custody, control, education and guardianship of his minor child Kathleen Richards be given to him as is provided by law.

Petitioner's answer to the respondent's counterclaim avers that in the bastardy proceeding in the Municipal Court the respondent pleaded not guilty and denied under oath at the hearing that he had ever had sexual relations with the mother Marion Richards; that the respondent was ordered to pay the sum of \$1100 for the support and maintenance of said Kathleen Richards, payable at the rate of \$200 for the first year and \$100 per year thereafter for nine years, in accordance with Illinois statutes concerning

guardian be authorized and empowered to assent to the legal adoption of said child. The concluding paragraph prays that some suitable person be appointed guardian over the person of Kathleen Richards and authorized and empowered as such guardian to assent to her legal adoption.

Respondent's answer avers that in a cause entitled

People of the State of Illinois ex rel. Marion Richards v.

Emily Heron, the Municipal Court of Chicago, on December 11, 1940, entered judgment finding respondent to be the putative father of said Kathleen Richards; that under the law of the State of Illinois commonly referred to as the Bastardy Act, Chapter 17, Smith-Hurd Annotated Statutes, the respondent is entitled to the custody and control of Kathleen Richards; that respondent is gainfully employed and earns sufficient wages to provide suitable care, maintenance, education and guardianship of Kathleen Richards; that he is a married man living with his wife in a respectable neighborhood in the City of Chicago; that his wife has expressed willingness to receive the child in their home as a member of the family of the respondent; that the respondent does not consent to the adoption of the child by Mr. and Mrs. Charles Brady. Respondent's counterclaim concludes with a prayer that the care, custody, control, education and guardianship of his minor child Kathleen Richards be given to him as is provided by law.

Petitioner's answer to the respondent's counterclaim avers

that in the bastardy proceeding in the Municipal Court the respondent pleaded not guilty and denied under oath at the hearing that he had ever had sexual relations with the mother Marion Richards; that the respondent was ordered to pay the sum of \$100 for the support and maintenance of said Kathleen Richards, payable at the rate of \$300 for the first year and \$100 per year thereafter for nine years, in accordance with Illinois statutes concerning

bastardy; that he has never contributed to the support of Kathleen Richards and still refuses so to do; that as a result of the respondent's refusal to contribute anything to the support of the child, the mother, Marion Richards, was unable to keep her child; that the Bradys have given the child a good home free of any expense to the public or to the mother, and that the Bradys now wish to adopt the child.

After extended hearings, the trial court, on July 31, 1944, entered a supplemental decree which found that Emory Herron, the natural father, has no right to the custody of the child by virtue of Section 13 of the Bastardy Act; that it is for the best interests of the child and of The People of the State of Illinois that Kathleen Richards remain under the guardianship of Harry Hill, chief probation officer of the Juvenile Court, under the decree heretofore entered in this cause on January 27, 1941; that Mr. and Mrs. Charles Brady, with whom the child was placed under the original decree, are fit and proper persons to continue to have the custody of the child and to adopt it in accordance with the statute in such case made and provided; and that the natural father, Emory Herron, is not entitled to have the guardianship order heretofore entered herein vacated and set aside.

Respondent's principal contention is that since he was adjudged to be the putative father of the bastard child, and the mother having relinquished the custody of her child, the court should have given the custody to respondent on the ground that the respondent and his wife offered a fit and proper home for the rearing of the child. In this brief respondent's counsel does not complain that the findings in the decree are against the manifest weight of the evidence, but he argues in effect that respondent as the natural father has a right under section 13 of the Bastardy Act to the custody of his child superior to that a parent would have, when the question of custody is controverted, of a child

bastardy; that he has never contributed to the support of Kathleen

Richards and will refuse so to do; that as a result of the

respondent's refusal to contribute anything to the support of the

child, the mother, Marion Richards, was unable to keep her child;

that the Bradys have given the child a good home free of any

expense to the public or to the mother, and that the Brady now

wish to adopt the child.

After extended hearings, the trial court, on July 31,

1944, entered a supplemental decree which found that Mary Heron,

the natural father, has no right to the custody of the child by

virtue of Section 13 of the Bastardy Act; that it is for the best

interests of the child and of The People of the State of Illinois

that Kathleen Richards remain under the guardianship of Harry Hill,

chief probation officer of the Juvenile Court, under the decree

heretofore entered in this cause on January 27, 1941; that Mr.

and Mrs. Charles Brady, with whom the child was placed under the

original decree, are fit and proper persons to continue to have

the custody of the child and to adopt it in accordance with the

statute in such case made and provided; and that the natural father,

Mary Heron, is not entitled to have the guardianship order her-

etofore entered herein vacated and set aside.

Respondent's principal contention is that since he was

adjudged to be the putative father of the bastard child, and the

mother having relinquished the custody of her child, the court

should have given the custody to respondent on the ground that the

respondent and his wife offered a fit and proper home for the

rearing of the child. In this brief respondent's counsel does not

complain that the findings in the decree are against the manifest

weight of the evidence, but he argues in effect that respondent as

the natural father has a right under section 13 of the Bastardy

Act to the custody of his child and error to that a parent would

have, when the question of custody is controverted, of a child

born in wedlock.

It is urged by The People that where a controversy surrounds the custody of a bastard child, though the right of the parents exists, a paramount consideration is the best welfare of the child itself.

In The People v. Weeks, 228 Ill. App. 262, 268, this court, in adverting to The People v. Porter, 23 Ill. App. 196, said:

"In controversies of this character, three matters are to be regarded; the rights of the parent, the rights and interests of the person or persons to whom the care and custody of the infant child has been given by the parent, and the welfare of the child; and of these three the last mentioned is the matter of primary and paramount importance."

To the same effect are The People v. Nelson, 235 Ill. App. 410, 415, 416; Cormack v. Marshall, 211 Ill. 519, 527; and Sullivan v. The People, 224 Ill. 468, 477.

The evidence shows that in the proceedings before the Municipal Court the respondent denied paternity of Kathleen Richards and contested the bastardy proceedings. After judgment was entered against him he refused to pay any support money due under its terms. In the original Juvenile Court proceedings instituted June 5, 1940, respondent did not enter an appearance or file an answer. In his sworn answer to the present petition, which was filed May 12, 1942, he again denied the paternity of Kathleen Richards. During the proceedings in the Municipal Court and in the Juvenile Court, respondent was living with his wife. Although respondent was gainfully employed except for a few months prior to April 1941 and had an equity of about three thousand dollars in his home, he and his wife made joint contributions to the mother of the child aggregating about \$15.00. Since 1941 the Bradys have shown a marked devotion to Kathleen Richards. They own the house in which they live. Mr. Brady is employed as an engineer, and his wife looks after her household duties.

born in wedlock.

It is urged by The People that where a controversy surrounds the custody of a bastard child, though the right of the parents exists, a paramount consideration is the best welfare of the child itself.

In The People v. Weeks, 228 Ill. App. 282, 283, this court,

in adverting to The People v. Porter, 23 Ill. App. 196, said:

"In controversies of this character, three matters are to be regarded; the rights of the parent, the rights and interests of the person or persons to whom the care and custody of the infant child has been given by the parent, and the welfare of the child; and of these three the last mentioned is the matter of primary and paramount importance."

To the same effect are The People v. Nelson, 235 Ill. App. 410, 413, 416; Cornack v. Wenzel, 211 Ill. 519, 527; and Gulliver v. The People, 224 Ill. 468, 477.

The evidence shows that in the proceedings before the Municipal Court the respondent denied paternity of Kathleen Richards and contested the bastardy proceedings. After judgment was entered against him he refused to pay any support money due under its terms. In the original Juvenile Court proceedings instituted June 5, 1940, respondent did not enter an appearance or file an answer. In his sworn answer to the present petition, which was filed May 18, 1942, he again denied the paternity of Kathleen Richards. During the proceedings in the Municipal Court and in the Juvenile Court, respondent was living with his wife. Although respondent was voluntarily employed except for a few months prior to April 1941 and had an equity of about three thousand dollars in his home, he and his wife made joint contributions to the mother of the child aggregating about \$5.00. Since 1941 the Bragys have shown a marked devotion to Kathleen Richards. They own the house in which they live. Mr. Bragy is employed as an engineer, and his wife looks after her household duties.

Respondent has never had custody of his child. From the trial court's written opinion (Abst. 76) it appears that all the evidence adduced was carefully considered by the court in determining the best interests of the child.

In our opinion there is ample evidence to support the findings and decree. Application of the principles announced in the cases hereinabove cited makes respondent's position untenable.

For the reasons stated, the decree is affirmed.

DECREE AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

Respondent has never had custody of his child. From the trial court's written opinion (Abat, 78) it appears that all the evidence adduced was carefully considered by the court in determining the best interests of the child.

In our opinion there is ample evidence to support the findings and decree. Application of the principles announced in the cases hereinabove cited makes respondent's position untenable. For the reasons stated, the decree is affirmed.

DECREES AFFIRMED.

KILLEY, P. J. AND BURKE, J. CONCUR.

43668

EDWIN M. HADLEY, JR.,

Appellee,

v.

ERNEST E. LILLIANDER, et al.,

Defendants,

On Appeal of WILLIAM H. MURPHY
and HENRY F. HAGEMEYER,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

239
328 I.A. 591

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a second appeal of this cause, which was reported in Volume 327 Ill. App. 224, General Number 43119. Reference to that decision will show what the facts in the case are without repeating them here. Atlantic Casting & Engineering Corporation, a corporation, issued three certificates of stock for 839 shares each in the names of plaintiff and defendants Murphy and Hagemeyer, respectively. In the original decree it was provided that the Clerk of the Superior Court deliver one of the certificates to plaintiff and one to each of the defendants upon payment to plaintiff by defendants or either of them of the amount provided in the decree and, in the event of failure of the defendants to make such payments, plaintiff be declared the absolute owner of the stock.

In this court the original decree was substantially affirmed in all respects except that the chancellor was directed to add a provision to the decree providing for the sale of all the stock in a block. After the mandate of this court was issued, the cause was reinstated in the Superior Court and several hearings were had before the chancellor. On December 5, 1945 an order was entered by the chancellor amending the original decree pursuant to our opinion.

EDWIN M. HADLEY, JR.,

Appellee,

v.

ERNEST E. LILLIANER, et al.,

Defendants,

On Appeal of WILLIAM E. MURPHY
and HENRY E. HAGEMEYER,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY,

3281.A.591

MR. JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

This is a second appeal of this cause, which was

reported in Volume 327 Ill. App. 224, General Number 4319.

Reference to that decision will show what the facts in the case are without repeating them here. Atlantic Casting & Engineering

Corporation, a corporation, issued three certificates of stock

for 839 shares each in the names of plaintiff and defendants

Murphy and Hagemeier, respectively. In the original decree it

was provided that the Clerk of the Superior Court deliver one

of the certificates to plaintiff and one to each of the defendants

upon payment to plaintiff by defendants or either of them of the

amount provided in the decree and, in the event of failure of the

defendants to make such payments, plaintiff be declared the

absolute owner of the stock.

In this court the original decree was substantially

affirmed in all respects except that the chancellor was directed

to add a provision to the decree providing for the sale of all

the stock in a block. After the mandate of this court was issued,

the cause was reinstated in the Superior Court and several hearings

were had before the chancellor. On December 5, 1945 an order was

entered by the chancellor amending the original decree pursuant

to our opinion.

On December 17, 1945, defendants filed a petition praying that the order of December 5, 1945 be modified by continuing the date for sale in block of the stock in question and further extending the time set to retire the lien of the plaintiff against the certificates of stock issued in the names of the defendants. The chancellor denied the petition, and defendants bring the instant appeal.

The record discloses that during the several hearings prior to the entry of the order of December 5, 1945, the plaintiff furnished the defendant certain balance sheets purporting to show the financial status of Atlantic Casting & Engineering Corporation; that in recent months the corporation had suffered serious financial losses; that the plaintiff had charged the costs of the present litigation, amounting to \$21,576.50 to the corporation; and that the books of the corporation also show an item of \$28,150.00 for accrued directors' fees. Defendants contend that the order of December 5, 1945, amending the original decree, did not give them ample time or opportunity to make a complete investigation of the financial status of Atlantic Casting & Engineering Corporation for the purpose of making an intelligent bid for the stock. It is urged by plaintiff that the sole question presented for determination is whether the chancellor complied with the mandate of this court.

The law is well settled that when a case is remanded by this court with specific directions the court below has no power but to carry them out (Union Nat. Bk. v. Hines, 187 Ill. 109, 114), and the chancellor may take only such proceedings as conform to the judgment of the court of review. (The People v. Finnegan, 350 Ill. 109-112; Tribune v. Emery Motor Livery Co., 338 Ill. 537-540; Grozier v. Freeman Coal Mining Co., 363 Ill. 362-390.)

On December 17, 1945, defendants filed a petition praying

that the order of December 5, 1945 be modified by continuing the date for sale in block of the stock in question and further extending the time set to retire the lien of the plaintiff against the certificates of stock issued in the names of the defendants. The chancellor denied the petition, and defendants bring the instant appeal.

The record discloses that during the several hearings prior

to the entry of the order of December 5, 1945, the plaintiff furnished the defendant certain balance sheets purporting to show the financial status of Atlantic Casting & Engineering Corporation; that in recent months the corporation had suffered serious financial

losses; that the plaintiff had charged the costs of the present litigation, amounting to \$17,875.50 to the corporation; and that the books of the corporation also show an item of \$28,150.00 for

accrued directors' fees. Defendants contend that the order of December 5, 1945, amending the original decree, did not give them ample time or opportunity to make a complete investigation of the financial status of Atlantic Casting & Engineering Corporation for the purpose of making an intelligent bid for the stock. It is urged by plaintiff that the sole question presented for determination is whether the chancellor complied with the mandate of this court. The law is well settled that when a case is remanded by

this court with specific directions the court below has no power but to carry them out (Union Nat. Bk. v. Wines, 187 Ill. 109, 114),

and the chancellor may take only such proceedings as conform to the judgment of the court of review. (The People v. Fitzhugh, 350 Ill. 108-112; Toland v. Henry Motor Laundry Co., 358 Ill. 537-540;

Grozier v. Freeman Coal Mining Co., 353 Ill. 368-390.)

Whether Atlantic Casting & Engineering Corporation was mismanaged by the plaintiff or other officers of the corporation as charged by the defendants was not before the chancellor in the present proceeding. The record discloses, however, that the chancellor did endeavor to obtain for the defendants the information they requested relative to the financial status of the corporation, without going too far afield. After hearing all the testimony in the former proceeding as well as that adduced in the instant case, the chancellor fixed a time which he regarded as reasonable under all the surrounding and attendant circumstances.

Unless we can say that the evidence clearly shows an abuse of the discretionary power granted the chancellor under the mandate in our former opinion, this court would not be warranted in disturbing the order of December 5, 1945, amending the original decree. In our opinion, from a careful reading of the record in this case, the evidence does not justify a modification of the order of December 5, 1945 as prayed for in defendants' petition.

For the reasons given, the order is affirmed and its provisions should be carried out within a time to be fixed by the chancellor.

ORDER AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

Whether Atlantic Casting & Engineering Corporation was
 mismanaged by the plaintiff or other officers of the corporation
 as charged by the defendants was not before the chancellor in
 the present proceeding. The record discloses, however, that the
 chancellor did endeavor to obtain for the defendants the information
 they requested relative to the financial status of the corporation,
 without going too far afield. After hearing all the testimony in
 the former proceeding as well as that adduced in the instant case,
 the chancellor fixed a time which he regarded as reasonable under
 all the surrounding and attendant circumstances.

Unless we can say that the evidence clearly shows an
 abuse of the discretionary power granted the chancellor under the
 mandate in our former opinion, this court would not be warranted
 in disturbing the order of December 5, 1945, amending the original
 decree. In our opinion, from a careful reading of the record in
 this case, the evidence does not justify a modification of the
 order of December 5, 1945 as prayed for in defendants' petition.
 For the reasons given, the order is affirmed and its
 provisions should be carried out within a time to be fixed by the
 chancellor.

ORDER AFFIRMED.

KILLEY, P.J. AND BURKE, J. CONCUR.

43701

Z. S. MANGOU and B. R. MANGOU,

Plaintiffs - Appellees,

v.

THE TRUST COMPANY OF CHICAGO, a corporation of Illinois, as Trustee under Trust Agreement dated April 12th, 1945, and known as Trust No. 4564, CHICAGO TITLE & TRUST COMPANY, a corporation of Illinois, as Trustee under Trust Deed recorded as Document No. 13495971, BERNARD STEINMAN and FRANCIS L. DAILY,

Defendants - Appellees,

S. M. HOMAN and ROSE Y. HOMAN,

Defendants - Appellants.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

COOK COUNTY.

740

328 I.A. 592

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order entered on pleadings and evidence, on January 11, 1946 appointing a receiver for an apartment hotel located at the northwest corner of Indiana Avenue and 24th Street in the City of Chicago.

On December 26, 1945 plaintiffs filed their bill of complaint alleging in substance that plaintiffs and the Trust Company of Chicago, a corporation, as Trustees under a certain trust agreement, are the owners of a seven-story brick building located at the northwest corner of Indiana Avenue and 24th Street, in the City of Chicago, containing 384 rentable hotel apartments; that one Bernard Steinman holds a tax certificate for \$17,000 which he claims is a lien on the premises; that the Trust Company of Chicago holds an undivided one-half interest in the premises for and on behalf of the Homans; that from April 12, 1945 to December 8, 1945 the premises were managed by plaintiff B. R. Mancou; that on December 8, 1945 defendant S. M. Homan forcibly ousted B. R. Mancou from the premises and the management thereof

E. S. MANCOW and B. F. MANCOW,

Plaintiffs - Appellees,

v.

THE TRUST COMPANY OF CHICAGO, a
 corporation of Illinois, as Trustee
 under Trust Agreement dated April 12th,
 1945, and known as Trust No. 4534,
 CHICAGO TITLE & TRUST COMPANY, a
 corporation of Illinois, as Trustee
 under Trust Deed recorded as Document
 No. 1349397, HERMAN STEINMAN and
 FRANK L. DAILY,

Defendants - Appellants,

S. M. HOMAN and ROSE Y. HOMAN,

Defendants - Appellants.

MR. JUSTICE LANE DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order entered

on pleadings and evidence, on January 11, 1946 appointing a

receiver for an apartment hotel located at the northwest corner

of Indiana Avenue and 24th Street in the City of Chicago.

On December 26, 1945 plaintiffs filed their bill of

complaint alleging in substance that plaintiffs and the Trust

Company of Chicago, a corporation, as Trustees under a certain

trust agreement, are the owners of a seven-story brick building

located at the northwest corner of Indiana Avenue and 24th Street,

in the City of Chicago, containing 384 rentable hotel apartments;

that one Herman Steinman holds a tax certificate for \$17,000

which he claims is a lien on the premises; that the Trust Company

of Chicago holds an undivided one-half interest in the premises

for and on behalf of the Homans; that from April 12, 1945 to

December 8, 1945 the premises were managed by Plaintiff E. S.

Mancow; that on December 8, 1945 defendant S. M. Homan forcibly

ejected E. S. Mancow from the premises and the management thereof

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

COOK COUNTY.

3281A.582

and discharged all the clerks and other employees retained by plaintiff; and that he is now in possession and collecting all the rents, issues and profits of the premises. The bill concludes with a prayer for a partition of the premises, attorney's fees, and general relief.

On January 8, 1946 plaintiffs served notice that they would appear before the chancellor and move for the appointment of a receiver in accordance with the prayer of their petition, a copy of which notice and petition was served on defendants' counsel. On January 11, 1946, when the matter came on for hearing, the plaintiffs presented their petition for the appointment of a receiver and the Homans filed instantner their answer to plaintiffs' petition and an answer to the complaint.

Plaintiffs' verified petition for the appointment of a receiver alleges that the premises in question were purchased on April 12, 1945 on behalf of the plaintiffs and the Homans; that until the 8th day of December, 1945 plaintiffs were in actual possession thereof for themselves and the Homans; that on the 8th day of December, 1945 the Homans entered the premises with the aid of other persons whose names are unknown, and forcibly evicted the manager, bookkeepers and other employees; that they posted certain individuals at the entrance of the premises who warned plaintiffs and the employees to keep away from the premises and refused them access or possession thereto; that there are numerous unpaid bills; that checks were issued which were returned marked "insufficient funds"; that various tenants have refused and failed to pay rent; and that the Homans have failed to maintain the premises and are permitting waste and dissipation of the income from the premises. The prayer was for an order to be entered appointing a receiver.

and discharged all the clerks and other employees retained by plaintiff; and that he is now in possession and collecting all the rents, issues and profits of the premises. The bill concludes with a prayer for a partition of the premises, attorney's fees, and general relief.

On January 8, 1946 plaintiff served notice that they would appear before the chancellor and move for the appointment of a receiver in accordance with the prayer of their petition, a copy of which notice and petition was served on defendants' counsel. On January 11, 1946, when the matter came on for hearing, the plaintiffs presented their petition for the appointment of a receiver and the Honors filed instantly their answer to plaintiffs' petition and an answer to the complaint.

Plaintiffs' verified petition for the appointment of a receiver alleges that the premises in question were purchased on April 12, 1945 on behalf of the plaintiffs and the Honors; that until the 8th day of December, 1945 plaintiffs were in actual possession thereof for themselves and the Honors; that on the 8th day of December, 1945 the Honors entered the premises with the aid of other persons whose names are unknown, and forcibly evicted the manager, bookkeepers and other employees; that they posted certain individuals at the entrance of the premises who warned plaintiffs and the employees to keep away from the premises and refused them access or conversation thereto; that there are numerous unpaid bills; that checks were issued which were returned marked "Insufficient Funds"; that various tenants have refused and failed to pay rent; and that the Honors have failed to maintain the premises and are permitting waste and dissipation of the income from the premises. The prayer is for an order to be entered appointing a receiver.

After denying substantially all of the allegations of the petition for the appointment of a receiver, Homans in their joint and several answers admit that S. M. Homan is now in physical possession of the premises. The answer avers that they have filed an answer to the complaint and incorporate by reference all the allegations of the answer to the complaint in their answer to the plaintiffs' petition, and pray that the allegations of the answer to the complaint be considered by the court in determining whether a receiver be appointed.

The answer to the complaint which is incorporated in the answer to plaintiffs' petition for the appointment of a receiver avers substantially as follows: that plaintiffs are not the owners of an undivided one-half interest in the premises involved herein; that plaintiffs should be divested of their interest in said premises, if any, acquired by them by reason of the wrongful issuance and recording of a certain trustee's deed dated December 11, 1945; that on or about April 12, 1945 Homans and plaintiffs purchased the premises; that the rights and obligations of the plaintiffs, Homans and the Trust Company of Chicago, a corporation, as trustee, with respect to the premises were fully set forth in a trust agreement attached to the answer to the complaint and is marked Exhibit A; that under the terms of said trust agreement said trustee agreed to hold title to said premises for the uses and purposes and upon the trusts therein set forth, and plaintiffs, as joint tenants, were therein declared to be entitled only to the earnings, avails and proceeds of said premises as to an undivided one-half interest; that to circumvent the provisions of said trust agreement plaintiffs unlawfully confederated, conspired, connived and colluded with each other and with said trustee through its trust officer one

After denying substantially all of the allegations of the petition for the appointment of a receiver, Homans in their joint and several answers admit that E. M. Homans is now in physical possession of the premises. The answers aver that they have filed an answer to the complaint and incorporate by reference all the allegations of the answer to the complaint in their answer to the plaintiffs' petition, and pray that the allegations of the answer to the complaint be considered by the court in determining whether a receiver be appointed.

The answer to the complaint which is incorporated in the answer to plaintiffs' petition for the appointment of a receiver avers substantially as follows: that plaintiffs are not the owners of an undivided one-half interest in the premises involved herein; that plaintiffs should be divested of their interest in said premises if any, acquired by them by reason of the wrongful issuance and recording of a certain trustee's deed dated December 17, 1945; that on or about April 12, 1946 Homans and plaintiffs purchased the premises; that the rights and obligations of the plaintiffs, Homans and the Trust Company of Chicago, a corporation, as trustee, with respect to the premises were fully set forth in a trust agreement attached to the answer to the complaint and is marked Exhibit A; that under the terms of said trust agreement said trustee agreed to hold title to said premises for the uses and purposes and upon the trusts therein set forth, and plaintiffs, as joint tenants, were therein declared to be entitled only to the earnings, avails and proceeds of said premises as to an undivided one-half interest; that to circumvent the provisions of said trust agreement plaintiffs unlawfully conspired, connived and colluded with each other and with said trustee through its trust officer one

S. A. Stamberg for the purpose of having said trustee issue a deed to plaintiffs conveying to them an undivided one-half interest in said premises, contrary to the terms of said trust agreement; and that by reason thereof the said trustee did on December 11, 1945 execute and deliver to plaintiffs a deed conveying to them an undivided one-half interest in and to said premises, contrary to and in violation of the terms of said trust agreement which were then well known to plaintiffs and to said trustee. Further answering, Homans deny that no other person or persons than the parties mentioned in the complaint have any interest in or to said premises, and state the fact to be that said premises are occupied by the following named persons (naming 304 of the alleged tenants) as tenants.

Homans' theory of the case as set forth in their brief is (1) that plaintiffs are not entitled to partition, as they obtained by fraud a deed to an undivided one-half interest in the property herein involved; that the inequitable conduct of plaintiffs stands admitted by the pleadings; (2) that the partition suit must fail because of lack of necessary parties; (3) that the complaint did not allege any facts warranting a dissolution of the partnership, nor did it pray for a dissolution of a partnership between plaintiffs and the Homans, and the complaint did not allege any facts warranting the appointment of a receiver, nor did it pray for the appointment of a receiver; and (4) mere disagreement between partners does not warrant the appointment of a receiver, and the appointment of the receiver was contrary to the law and the facts.

In support of their first point Homans' maintain in their argument that the new matter alleged in their answer to the complaint to which no reply had been filed by plaintiffs when the hearing was had on January 11, 1946, is deemed admitted under Section 40 of the Civil Practice Act. The alleged new matter is

B. A. Stamborg for the purpose of having said trustee issue a deed to plaintiffs conveying to them an undivided one-half interest in said premises, contrary to the terms of said trust agreement; and that by reason thereof the said trustee did on December 11, 1945 execute and deliver to plaintiffs a deed conveying to them an undivided one-half interest in and to said premises, contrary to and in violation of the terms of said trust agreement which were then well known to plaintiffs and to said trustee. Further answer in, Homans deny that no other person or persons than the parties mentioned in the complaint have any interest in or to said premises, and state the fact to be that said premises are occupied by the following named persons (namely 304 of the alleged tenants) as tenants.

Homans' theory of the case as set forth in their brief is (1) that plaintiffs are not entitled to partition, as they obtained by fraud a deed to an undivided one-half interest in the property herein involved; that the inadmissible conduct of plaintiffs stands admitted by the pleadings; (2) that the partition suit must fail because of lack of necessary parties; (3) that the complaint did not allege any facts warranting a dissolution of the partnership, nor did it pray for a dissolution of a partnership between plaintiffs and the Homans, and the complaint did not allege any facts warranting the appointment of a receiver, nor did it pray for the appointment of a receiver; and (4) were disagreement between partners does not warrant the appointment of a receiver, and the appointment of the receiver was contrary to the law and the facts.

In support of their first point Homans maintain in their argument that the new matter alleged in their answer to the complaint to which no reply had been filed by plaintiffs when the hearing was had on January 11, 1946, is deemed admitted under Section 40 of the Civil Practice Act. The alleged new matter is

that plaintiffs acquired their interests "by reason of the wrongful issuance and recording of a certain trustee's deed"; "that under the terms of the trust agreement said trustee agrees to hold title to the said premises for the uses and purposes and upon the trusts therein set forth"; that "plaintiffs unlawfully confederated, conspired and colluded with each other and with the trustee"; that "the said trustee did execute and deliver to plaintiffs a deed contrary to and in violation of the terms of the trust agreement." No facts are stated in the answer to show the wrongful issuance of the deed to plaintiffs, nor do the facts and circumstances appear which constitute the fraud and conspiracy. Standing by themselves, these allegations are mere conclusions of law. (Aaron v. Dausch, 313 Ill. App. 524, 533; Randall Dairy Co. v. Pevely Dairy Co., 274 Ill. App. 474; Illinois Minerals Co. v. McCarty, 318 Ill. App. 423, 434; Nichols Illinois Civil Practice, Vol. 2, Sec. 777.)

The averment in the answer that plaintiffs' deed was issued "contrary to and in violation of the terms of the trust agreement" is a conclusion of the pleader as to the legal effect of the provisions of the trust agreement. In our opinion no inferences of inequitable conduct can be drawn from plaintiffs' failure to reply to the foregoing allegations of the answer.

With regard to the second point urged by Homans, in Boddiker v. McPartlin, 379 Ill. 567, substantially the same contentions were made concerning the alleged lack of necessary parties as in the case at bar. There the court said, at page 575:

"Defendant has not been prejudiced by the nonjoinder of 'persons' in possession and judgment creditors of bondholders. If it later develops that any other parties are interested in the premises plaintiffs can make them defendants pursuant to section 26 of the Civil Practice act."

that plaintiffs acquired their interests "by reason of the wrongful issuance and recording of a certain trustee's deed"; "that under the terms of the trust agreement said trustee agrees to hold title to the said premises for the use and purposes and upon the trusts therein set forth"; that "plaintiffs unlawfully conveyed, conveyed and colluded with each other and with the trustee"; that "the said trustee did . . . execute and deliver to plaintiffs a deed . . . contrary to and in violation of the terms of the trust agreement." No facts are stated in the answer to show the wrongful issuance of the deed to plaintiffs, nor do the facts and circumstances appear which constitute the fraud and conspiracy. Standing by themselves, these allegations are mere conclusions of law. (Aaron v. Lunsch, 313 Ill. App. 524, 525; Appel v. Dairy Co., 318 Ill. App. 474; Illinois Mineral Co. v. McGarry, 318 Ill. App. 423, 424; Nichols Illinois Civil Practice, Vol. 2, Sec. 777.)

The verment in the answer that plaintiffs' deed was issued "contrary to and in violation of the terms of the trust agreement" is a conclusion of the pleader as to the legal effect of the provisions of the trust agreement. In our opinion no inference of inequitable conduct can be drawn from plaintiffs' failure to reply to the foregoing allegations of the answer.

With regard to the second point urged by Romans, in Bohlander v. McPartlin, 373 Ill. 317, substantially the same contentions were made concerning the alleged lack of necessary parties as in the case at bar. There the court said, at page 376: "Defendant has not been prejudiced by the nonjoinder of 'persons' in possession and judgment creditors of bondholders. If it later develops that any other parties are interested in the premises plaintiffs can make their claimants pursuant to section 28 of the Civil Practice act."

In their answer Homans name more than 300 tenants as occupants of the premises but no reference is made to the nature and character of their tenancy. Whether they were transient guests moving from day to day or bound by leases for a definite term does not appear from the answer. Manifestly, naming all of the guests of a large hotel as parties defendant in a complaint for partition is not only extremely difficult but in most instances futile, since the guests are constantly changing. Many of those named in the complaint when the suit is filed would necessarily have to be dismissed on the ground that they had no interest "in possession or otherwise" and the new guests added as parties defendant. This at best would be an interminable process, As pointed out in the Boddiker case, Homans cannot be prejudiced in the instant case by a delay in joining the tenants until after plaintiffs' right to partition is determined.

Defendants urge as their third point that the complaint did not allege any facts warranting the appointment of a receiver nor did they pray for the appointment of a receiver. The bill contains a prayer for general relief and was later supplemented by a petition for the appointment of a receiver. The bill as well as the petition alleges many acts of misconduct by Homans in the operation of the hotel. In the case of Reliance Bank & Trust Co. v. Dalsey, 263 Ill. App. 546, it is held that a prayer for general relief is sufficient to warrant the appointment of a receiver pendente lite before the hearing. We do not think that Homans' position on this point is tenable.

As to Homans' final contentions, the evidence shows that the plaintiff B. R. Mancou had exclusive management of the hotel until December 8, 1945; that he collected all the rents, and that there was a monthly income of \$12,000; that he bought all the furniture; when the hotel was purchased a bank account was opened at the

In their answer Homans name more than 300 tenants as occupants of the premises but no reference is made to the nature and character of their tenancy. Whether they were transient guests moving from day to day or bound by leases for a definite term does not appear from the answer. Manifestly, naming all of the guests of a large hotel as parties defendant in a complaint for partition is not only extremely difficult but in most instances futile, since the guests

are constantly changing. Many of those named in the complaint when the suit is filed would necessarily have to be dismissed on the ground that they had no interest "in possession or otherwise" and the new guests added as parties defendant. This at best would be an interminable process. As pointed out in the *Boddy* case, Homans cannot be prejudiced in the instant case by a delay in joining the tenants until after plaintiffs' right to partition is determined. Defendants urge as their third point that the complaint did not allege any facts warranting the appointment of a receiver nor did they pray for the appointment of a receiver. The bill contains a prayer for general relief and was later supplemented by a petition for the appointment of a receiver. The bill as well as the petition alleges many acts of misconduct by Homans in the operation of the hotel. In the case of *Reliance Bank & Trust Co. v. Casey*, 283 Ill. App. 546, it is held that a prayer for general relief is sufficient to warrant the appointment of a receiver pendente lite before the hearing. We do not think that Homans' position on this point is tenable.

As to Homans' final contention, the evidence shows that the plaintiff B. W. Hanson had exclusive management of the hotel until December 8, 1943; that he collected all the rents, and that there was a monthly income of \$12,000; that he bought all the furniture; when the hotel was purchased a bank account was opened at the

American National Bank in the name of "The Bennington"; that a number of other bank accounts were opened by Mancou and subsequently closed by Sam Homan; that some time before the Homans evicted plaintiffs, Sam Homan came to the hotel at night and wrote checks against the hotel account; that on other occasions he took money from the cash register; that on December 8, 1945 Homan came to the hotel about 8:15 o'clock in the morning accompanied by "two short white gentlemen and two tall colored gentlemen." Homan testified that "I went with bodyguards expecting trouble; I wanted to protect my life, health and happiness; I got into the inner office by breaking the panel of the door."

From a reading of the record there can be little doubt that the conduct of Sam Homan for several months prior to the appointment of the receiver caused a serious disruption of the operation of the hotel which resulted in injury to plaintiffs. The evidence amply justified the chancellor in appointing a receiver to protect and preserve the premises.

For the reasons stated, the order of January 11, 1946 appointing George Denison receiver of the premises in question is affirmed.

ORDER AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

American National Bank in the name of "The Hamilton"; that a number of other bank accounts were opened by Hanson and subsequently closed by Sam Homan; that some time before the Homan's evicted plaintiff, Sam Homan came to the hotel at night and wrote checks against the hotel account; that on other occasions he took money from the cash register; that on December 8, 1945 Homan came to the hotel about 8:15 o'clock in the morning accompanied by "two short white gentlemen and two tall colored gentlemen." Homan testified that "I went with bodyguards expecting trouble; I wanted to protect my life, health and happiness; I got into the inner office by breaking the panel of the door."

From a reading of the record there can be little doubt that the conduct of Sam Homan for several months prior to the appointment of the receiver caused a serious disruption of the operation of the hotel which resulted in injury to plaintiff. The evidence amply justified the chancellor in appointing a receiver to protect and preserve the premises.

For the reasons stated, the order of January 11, 1946 appointing George Denison receiver of the premises in question is affirmed.

CURTIS J. WELLS.

KILLY, P.J. AND BURKE, J. CONCUR.

43339

PEOPLE OF THE STATE OF ILLINOIS
ex rel. FLORENCE L. KLOPPER and
HENRY KLOPPER,

Appellants,

v.

CITY OF CHICAGO, a Municipal Corporation; EDWARD J. KELLY, Mayor of City of Chicago; JAMES P. ALLEMAN, Commissioner of Police of City of Chicago; OSCAR E. HEWITT, Commissioner of Public Works of City of Chicago; L. M. JOHNSON, Commissioner of Streets and Electricity of City of Chicago; WALTER WRIGHT, Superintendent of Parks, Recreation and Aviation of City of Chicago; and ARNOLD MERBITZ and WILFRED D. BYRNE, doing business as M. B. MOTORS,

Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

328 I.A. 671

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

By their second amended petition (hereinafter for convenience referred to as petition) relators sought a writ of mandamus to compel the defendants in their respective official capacities and Arnold Merbitz and Wilfred D. Byrne, doing business as M. B. Motors, to remove certain automobiles, other vehicles, advertising signs, electric-light fixtures and other appurtenances used by M. B. Motors for the conduct of their secondhand automobile business on property alleged to be a public parkway on the south side of East 78th street between Stony Island avenue and the north-and-south alley east thereof, in violation of law. Answers were filed by the city, its designated officials and by the individual defendants, certain portions of which were stricken by the court. Trial of the cause resulted in a denial of the petition for a writ of mandamus and the dismissal of defendants, from which relators appeal.

Relators adduced competent and uncontroverted evidence to show that in 1875 and later in 1914 there were public

PEOPLE OF THE STATE OF ILLINOIS
 vs. HENRY J. ROBERTS,
 Appellant.

v.

CITY OF CHICAGO, a Municipal Corporation; EDWARD J. KELLY, Mayor of City of Chicago; JAMES P. ALLEN, Commissioner of Police of City of Chicago; OSCAR M. HEWITT, Commissioner of Public Works of City of Chicago; J. M. JOHNSON, Commissioner of Streets and Electricity of City of Chicago; WALTER H. HIGHT, Superintendent of Parks, Recreation and Aviation of City of Chicago; and ALFRED MERRILL and WILFRED D. BYRNE, doing business as M. F. Motors, Appellees.

MR. PRESIDING JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

By their second amended petition (hereinafter for convenience referred to as petition) relators sought a writ of

mandamus to compel the defendants in their respective official capacities and Arnold Merrill and Wilfred D. Byrne, doing

business as M. F. Motors, to remove certain automobiles, other

vehicles, advertising signs, electric-light fixtures and other

apparatuses used by M. F. Motors for the conduct of their

secondhand automobile business on property alleged to be a

public highway on the south side of East 78th street between

Stony Island avenue and the north-and-south alley east thereof,

in violation of law. Answers were filed by the city, its

designated officials and by the individual defendants, certain

portions of which were stricken by the court. Trial of the

cause resulted in a denial of the petition for a writ of

mandamus and the dismissal of defendants, from which relators

appeal.

Relators advanced competent and uncontroverted evidence

to show that in 1925 and later in 1924 there were public

dedications of East 78th street, including that portion extending from Stony Island avenue in an easterly direction to and beyond the alley directly east thereof. Subsequently, in 1916, a paving ordinance established 78th street as 26 feet wide. The street being dedicated as 66 feet in width, it would extend 33 feet in each direction from the center of the roadway. The evidence further showed that the distance from the center of the roadway to the curb was 13 feet; that immediately to the south of the curb is a sidewalk six feet wide, so that from the center of the roadway to the south end of the sidewalk is a total of 19 feet; and that the 14 feet immediately south of the sidewalk constitutes a parkway which, in turn, is a part of the dedicated East 78th street.

The only structure in the area on the south side of East 78th street from Stony Island avenue to Cornell avenue, the first street to the east, is a large apartment building situated adjacent to and immediately east of the alley running between the two north-and-south streets. The sidewalk in front is six feet wide with a distance of 14 feet from the southerly line of the sidewalk to the north face of the building. At this point the sidewalk immediately joins the south curb of East 78th street. Also on the south side of East 78th street and in the area immediately west of the same alley, the 14 feet immediately south of the sidewalk is unimproved, and the only occupancy of the 14-foot strip is that of the defendants, M. B. Motors, for display of their automobiles for sale to the public and the maintenance of electric-light poles and advertising signs. The polls erected by the individual defendants are about 10 to 12 feet high, 30 to 40 feet apart, with electric-light wires containing 20 or 30 bulbs illuminated and maintained by M. B. Motors.

dedications of East 78th street, including that portion extending from Story Island Avenue in an easterly direction to and beyond the alley directly east thereof. Subsequently, in 1916, a paving ordinance established 78th street as 26 feet wide. The street being dedicated as 66 feet in width, it would extend 33 feet in each direction from the center of the roadway. The evidence further showed that the distance from the center of the roadway to the curb was 13 feet; that immediately to the south of the curb is a sidewalk six feet wide, so that from the center of the roadway to the south end of the sidewalk is a total of 19 feet; and that the 14 feet immediately south of the sidewalk constitutes a parkway which, in turn, is a part of the dedicated East 78th street.

The only structure in the area on the south side of East 78th street from Story Island Avenue to Cornhill Avenue, the first street to the east, is a large apartment building situated adjacent to and immediately east of the alley running between the two north-and-south streets. The sidewalk in front is six feet wide with a distance of 14 feet from the southerly line of the sidewalk to the north face of the building. At this point the sidewalk immediately joins the south curb of East 78th street. Also on the south side of East 78th street and in the area immediately west of the same alley, the 14 feet immediately south of the sidewalk is unimproved, and the only occupancy of the 14-foot strip is that of the defendant, M. B. Motors, for display of their automobiles for sale to the public and the maintenance of electric-light poles and advertising signs. The poles erected by the individual defendant are about 10 to 12 feet high, 30 to 40 feet apart, with electric-light wires containing 20 or 30 bulbs illuminated and maintained by M. B. Motors.

In 1943 Merbitz and Byrne submitted a written application to the City of Chicago for a permit to occupy the strip of land 7 feet by 100 feet on the south side of East 78th street between the existing sidewalk and the lot line between Stony Island avenue and the north-and-south alley east thereof for a period of three years at an annual compensation of \$50.00 per year, and the city council on December 15th of that year passed an order authorizing the superintendent of compensation to issue a permit, pursuant to a motion by one of the aldermen to concur in the report of the committee on local industries, streets and alleys, which had approved the application.

On December 23, 1943 a notice was served on defendants which referred to the council order and called attention to the fact that said strip of land is a public parkway, and that it had been used for some time by M. B. Motors for storage of automobiles for sale to the public; that such use for private gain automatically excluded the use thereof by the general public and was inimical to the public interest; that the demand was made on behalf of Florence and Henry Klopfer, as taxpayers and residents of the City of Chicago; that Klopfer had appeared before the committee on local industries, streets and alleys to object to the use of said public parkway for private gain, and had written letters to the city officials with respect thereto; and said notice made a demand upon the defendants charged by law with the duty and responsibility of protecting and safeguarding the public interests and public parkways, for the revocation of the permit theretofore granted, and for the immediate removal of the automobiles and other vehicles so stored by M. B. Motors as constituting a public nuisance and a purpresture upon a public parkway, and the notice further

In 1943 Morris and Wynne submitted a written appli-

cation to the City of Chicago for a permit to occupy the strip of land 7 feet by 100 feet on the south side of East 78th street between the existing sidewalk and the lot line between Stony Island Avenue and the north-and-south alley east thereof for a period of three years at an annual compensation of \$50.00 per year, and the city council on December 15th of that year passed an order authorizing the superintendent of compensation to issue a permit, pursuant to a motion by one of the aldermen to concur in the report of the committee on local industries, streets and alleys, which had approved the application.

On December 23, 1943 a notice was served on defendants

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advised defendants that if the demand were not heeded, relators would, within five days, take appropriate steps to enforce the removal in the public interest.

On December 29, 1943, after the foregoing notice had been served, a motion was adopted by the city council to reconsider the vote by which the permit had been granted to M. B. Motors, and to rerefer the order to the committee on local industries, streets and alleys. That motion was still pending at the time of the trial, no further action having been taken thereon.

It appears from the evidence that despite these circumstances M. B. Motors has continued to occupy said strip of land, has erected thereon posts and poles as heretofore described, to which are attached huge advertising signs setting forth the business in which M. B. Motors is engaged, and appurtenances which illuminate the signs, has paved the strip with small white stones, and stored and displayed thereon used automobiles for sale, and that the officials of the City of Chicago have not ordered M. B. Motors to remove said property and are permitting it to occupy and continue to use it for the purposes indicated.

Defendants in their joint brief interposed the twofold defense that (1) relators failed to establish their right to the writ of mandamus, and (2) the doctrine of unclean hands precluded them from obtaining the remedy sought. There is no merit whatever to the first defense. Relators introduced plats showing that East 78th street was dedicated in 1875 and 1914, that the dedicated portions extended from South Stony Island avenue in an easterly direction to and beyond the alley directly east thereof, that the city accepted said dedication and adopted ordinances establishing the width of the roadways and sundry streets, including 78th street at the point in question, from

advised defendants that if the demand were not heeded, relations would, within five days, take appropriate steps to enforce the removal in the public interest.

On December 29, 1943, after the foregoing notice had been served, a motion was adopted by the city council to reconsider the vote by which the permit had been granted to E. E. Motors, and to refer the order to the committee on local industries, streets and alleys. That motion was still pending at the time of the trial, no further action having been taken thereon. It appears from the evidence that despite these circumstances E. E. Motors has continued to occupy said strip of

land, has erected thereon posts and poles as heretofore described, to which are attached huge advertising signs setting forth the business in which E. E. Motors is engaged, and apparatuses which illuminate the signs, has paved the strip with small white stones, and stored and displayed thereon used auto-motiles for sale, and that the officials of the city of Chicago have not ordered E. E. Motors to remove said property and are permitting it to occupy and continue to use it for the purposes indicated.

Defendants in their joint brief interposed the twofold defense that (1) relations failed to establish their right to the strip of land, and (2) the doctrine of nuisance hands precluded them from obtaining the remedy sought. There is no merit whatever in the first defense. Relations introduced plates showing that West 70th Street was dedicated in 1897 and 1914, that the dedicated portions extended from South Stony Island Avenue in an easterly direction to and beyond the city directly east thereof, that the city accepted said dedication and adopted ordinances establishing the width of the roadway and curbs, streets, including 70th Street at the point in question, from

which it appears that the dedicated street was 66 feet in width and that the distance from the center of the roadway to the curb and over the sidewalk to the lot line were as heretofore stated. Klopfer supported the documentary evidence by oral testimony which was uncontroverted. The court in its oral opinion entertained some doubt as to the dedication, but the law is clear that the acknowledgment and recording of a plat in accordance with the statute, showing streets and alleys therein, operate effectually as a deed conveying title to the streets and alleys to the city. Corbin v. B. & O. C. Term. R. R. Co., 285 Ill. 439. Nor does the law require that evidence of title to the land platted be produced; the fact of platting and acknowledging are acts and evidence of ownership (Waugh v. Leech, 28 Ill. 488); and the acknowledgment and recording of such plat constitute a conveyance in fee simple of such portions of the premises platted as are marked or noted as donated or granted to the public, and the premises intended for streets, alleys, ways or other public use are held in the corporate name in trust and for the uses and purposes set forth or intended, namely, for public use as a public way (ch. 109, par. 3, Ill. Rev. Stat. 1943). When relators introduced in evidence survey plats properly recorded and acknowledged, showing the creation of a 66-foot public street known as East 78th street directly east of Stony Island avenue, defendants interposed no objection thereto, and the exhibits were admitted in evidence. They include the parcel of land in controversy, and under the provisions of the statute and the foregoing authorities, this constituted a proper dedication. Moreover, the dedication was accepted by the City of Chicago. In Needham v. Village of Winthrop Harbor, 331 Ill. 523, the court held that approval of a plat by a village was evidence that it complied with the

which it appears that the dedicated street was 66 feet in width and that the distance from the center of the roadway to the curb and over the sidewalk to the lot line were as heretofore stated. Roper supported the documentary evidence by oral testimony which was uncontroverted. The court in its oral opinion entertained some doubt as to the dedication, but the law is clear that the acknowledgment and recording of a plat in accordance with the statute, showing streets and alleys therein, operate effectually as a deed conveying title to the streets and alleys to the city.

Gordin v. B. & O. R. Co., 202 Ill. 439. Nor does the law require that evidence of title to the land plated be produced; the fact of plating, and acknowledging are acts and evidence of ownership (Harsh v. Leach, 28 Ill. 488); and the acknowledgment and recording of such plat constitute a conveyance in fee simple of such portions of the premises plated as are marked or noted as donated or granted to the public, and the premises intended for streets, alleys, ways or other public use are held in the corporate name in trust and for the uses and purposes set forth or intended, namely, for public use as a public way (Ch. 100, par. 3, Ill. Rev. Stat. 1943). When matters introduced in evidence survey plats properly recorded and acknowledged, showing the creation of a 66-foot public street known as East 73rd street directly east of Tony Island avenue, defendants interposed no objection thereto, and the exhibits were admitted in evidence. They include the parcel of land in controversy, and under the provisions of the statute and the foregoing authorities, this court sustained a proper dedication. Moreover, the dedication was accepted by the City of Chicago. In Woolham v. Village of Lincoln Harbor, 311 Ill. 523, the court held that approval of a plat by a village was evidence that it complied with the

statute. Such approval was had in the instant proceeding. It is suggested, however, that because the city did not improve all of the street there was no acceptance of the dedication. Kennedy v. Town of Normal, 359 Ill. 306, and McDonald v. Stark, 176 Ill. 456, are authority for the proposition that a municipality will be deemed to have accepted all the streets and alleys of a subdivision where it accepts the most important streets or major portions thereof and evinces no intention to refuse to accept any of them. Furthermore, acceptance may arise by express act, by implication from the acts of its officials, or user by the public for the purposes for which the property was dedicated (4 McQuillin (1943) on Municipal Corporations 773); and the paving and maintenance of a street has been held to be an act of acceptance (1 Elliott on Roads and Streets, p. 195, Consumers Co. v. City of Chicago, 268 Ill. 113, Village of Winthrop Harbor v. Curdes, 257 Ill. 596, Kimball v. City of Chicago, 253 Ill. 105). In the case at bar the roadway had been paved and improved and is used by the public, and under the decisions cited, acceptance cannot be only as to that portion occupied by the sidewalk and roadway, but as to the entire 66-foot strip of land shown on the plats as dedicated to the public for use by the public as a street and way.

The second defense interposed is that the writ of mandamus is an extraordinary remedy, the issuance of which lies in the sound discretion of the court, and that in view of Klopfer's attempt, as defendants characterize it, to "freeze out" M. B. Motors, his business competitor, the court was justified in exercising its discretion adversely to the relators. As stated in the opening paragraph of this opinion, certain portions of the answers were stricken. The stricken material related to the defense of unclean hands. Notwithstand-

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statute, such approval was not in the least proceeding.
It is suggested, however, that because the city did not
improve all of the street there was no acceptance of the
dedication. Turner v. Town of Herculano, 300 Ill. 306, and
McDonald v. City of Chicago, 176 Ill. 470, are authority for the
proposition that a municipality will be deemed to have accepted
all the streets and alleys of a subdivision when it accepts
the most important streets or major portions thereof and evidence
no intention to refuse to accept any of them. Furthermore,
acceptance may arise by express act, by implication from the
act of its officials, or even by the public for the purpose
for which the property was dedicated (4th edition (1943) on
Municipal Corporations 773); and the paving and maintenance of
a street has been held to be an act of acceptance (1 Bliss
on Torts and Streets, p. 109; City of Chicago v. City of Chicago,
308 Ill. 113; City of Chicago v. City of Chicago, 307 Ill.
506; City of Chicago v. City of Chicago, 307 Ill. 107). In the case
at bar the roadway had been paved and improved and is used by
the public, and under the decisions cited, acceptance cannot be
only as to that portion occupied by the sidewalk and roadway,
but as to the entire 66-foot strip of land shown on the plat
as dedicated to the public for use by the public as a street
and way.

The second defense interposed is that the plat of
recreation is an extraordinary remedy, the essence of which
lies in the total diversion of the land, and that in view
of the public's attempt, as defendant's declaration is, to
"freeze out" W. D. Moore, his business competitors, the court
was justified in exercising its discretion adversely to the
plaintiff. As stated in the opening paragraph of this opinion,
certain portions of the answers were striking. The defendant's
material related to the defense of unconscionable conduct.

ing this fact the court indicated that in his opinion this appeared to be a "spite case," and defendants still persist in alluding to the motive which prompted relators to institute proceedings. The doctrine of unclean hands has no application to the case at bar, because the performance of a duty to the public cannot be refused on any such basis. In Hummelshime v. Hirsch, 114 Md. 39, 79 Atl. 38, the court held that where a writ is sought to compel the performance of a duty to the public, the writ should not be denied because relator is actuated by personal ill-will in filing the petition.

At the instance of the court the relator gave his reasons for bringing the suit. He testified that he owned considerable property within the square block within which the premises are located, that he is a taxpayer, paying his taxes promptly, and maintains his various enterprises within the lot lines. We find no validity to the defense of unclean hands, especially in view of the fact that the subject matter relating thereto was stricken from the answer and thus eliminated from the proceeding.

For the reasons indicated the judgment of the trial court should be reversed and the cause remanded with directions to issue a writ as prayed, and it is so ordered.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS TO
ISSUE A WRIT OF MANDAMUS AS
PRAYED.

Scanlan and Sullivan, JJ., concur.

and this fact the court indicated that in his opinion this appeared to be a "spite case," and defendants still persist in alleging to the motive which prompted relations to institute proceedings. The doctrine of unclear hands has no application to the case at bar, because the performance of a duty to the public cannot be refused on any such basis. In Hammel v. Hirsch, 114 Md. 39, 79 Atl. 30, the court held that where a writ is sought to compel the performance of a duty to the public, the writ should not be denied because the actor is actuated by personal ill-will in filing the petition. At the instance of the court the relator gave his reasons for bringing the writ. He testified that he owned considerable property within the square block within which the premises are located, that he is a taxpayer, paying his taxes promptly, and maintaining his various enterprises within the lot lines. We find no validity to the defense of unclear hands, especially in view of the fact that the subject matter relating thereto was stipulated from the answer and thus eliminated from the proceedings. For the reasons indicated the judgment of the trial court should be reversed and the cause remanded with directions to issue a writ as prayed, and it is so ordered.

FORWARDED TO
RECEIVED BY
JULY 10 1910

Commissioner of Public Safety, D.C.

43676

ELLEN HOLT,

Appellant,

v.

CHICAGO HAIR GOODS CO., an
Illinois corporation,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

328 L.A. 671²

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendant on the finding of the court, in an action of forcible detainer to recover possession of premises in the City of Chicago, described as the south one-half of the fourth floor, known as 2635-45 South Wabash Avenue. Defendant was in possession under a written lease at a monthly rental of \$200.00, payable in advance, the lease to expire August 31, 1945. The premises were used for storage purposes. Philip F. W. Peck was agent for the plaintiff owner. His offices are at 506 South Wabash Avenue. Robert D. Smith was his leasing manager. Morris L. Goldstein was president of the defendant company, and Nathan L. Goldstein, secretary and treasurer.

Prior to the expiration of the lease, negotiations were opened by the agent of plaintiff and defendant for the execution of another lease. Smith says the conversations began in June, 1945. Morris Goldstein says the first conversation was some time in August. Goldstein and Smith agree it was at the office of defendant. Whatever the time, the witnesses also agree the agent of the owner asked \$450.00 per month rental for a renewed lease; that Mr. Goldstein said in substance defendant could not and would not pay that much rent. Smith says: "I finally told Mr. Goldstein we would give him a thirty-day extension of his present lease, from September 1 to September 30." Mr. Peck testifies to a similar conversation between him

43878

ELLEN WOLT,

Appellant,

v.

CHICAGO HALL GOODS CO., an
Illinois corporation,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

3281A.871

MR. PRESIDING JUSTICE MATHEW DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendant on the

finding of the court, in an action of forcible detainer to

recover possession of premises in the City of Chicago, described

as the south one-half of the fourth floor, known as 2838-45

South Wabash Avenue. Defendant was in possession under a

written lease at a monthly rental of \$200.00, payable in advance,

the lease to expire August 31, 1945. The premises were used

for storage purposes. Philip F. W. Beck was agent for the

plaintiff company. His offices are at 608 South Wabash Avenue.

Robert D. Smith was his leasing manager. Morris L. Goldstein

was president of the defendant company, and Nathan L. Goldstein,

secretary and treasurer.

Prior to the expiration of the lease, negotiations were

opened by the agent of plaintiff and defendant for the execution

of another lease. Smith says the conversations began in June,

1945. Morris Goldstein says the first conversation was some

time in August. Goldstein and Smith agree it was at the office

of defendant. However the time, the witnesses also agree

the agent of the owner asked \$450.00 per month rental for a

renewed lease; that Mr. Goldstein said in substance defendant

could not and would not pay that much rent. Smith says: "I

finally told Mr. Goldstein we would give him a thirty-day

extension of his present lease, from September 1 to September

30. Mr. Beck testifies to a similar conversation between him

2.

and Goldstein. He says: "I also spoke to him about the lease and he said he would like to have an extension and I said we would give him thirty days more and he said, 'Is that all you can give me?' I said, 'That's all, up to---' I said, 'We'll give you up to the 30th of September' and, 'Well,' he said, 'if that's all that's all then' or something like that." Cross-examined, Mr. Peck said: "I told Mr. Goldstein the best I could do was to give him thirty days and he said 'If that's all you can give me, I guess I can't do anything about it'. I told him we would have a lease made out and forwarded to him." Morris Goldstein says Smith said to him: "If you want it you can stay there in the meantime and I'll negotiate with the landlord". He says: "I said to him (Smith), 'try and get me at least six months time and then I'll be able to make arrangements to move that stuff', and he said to me he will try to do it." Goldstein further says: "Mr. Smith or anybody else did not talk to me about this thirty day lease. He didn't talk to me exactly about a thirty day lease but told me the landlord will not give me another year but if they rent the place, until they rent it we can stay in the meantime for a certain time."

On this vital point of whether there was a verbal agreement for a thirty-day extension of the lease, we have the testimony of Peck and Smith against the testimony of defendant. The preponderance seems to be in favor of plaintiff. The witnesses for her narrate the more probable story and are corroborated by facts in evidence establishing plaintiff's theory.

Smith prepared a loft lease from the owner to defendant for a term beginning September 1st and ending September 30, 1945, at a rental of \$200.00 per month. The leases are in the record and were mailed to defendant from Peck's office with a letter dated August 30, 1945. The letter was also mailed on that date.

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and he said he would like to have an extension and I said

we would give him thirty days more and he said, 'Is that all

you can give me?' I said, 'That's all, up to---' I said,

'We'll give you up to the 30th of September,' and, 'Well,' he said, 'If that's all that's all then, or something like that.'

Gross-examined, Mr. Beck said: "I told Mr. Goldstein the

best I could do was to give him thirty days and he said 'If

that's all you can give me, I guess I can't do anything about

it.' I told him we would have a lease made out and forwarded

to him." Morris Goldstein says Smith said to him: "If you

want it you can stay here in the meantime and I'll negotiate

with the landlord". He says: "I said to him (Smith), 'try and

get me at least six months time and then I'll be able to make

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to do it." Goldstein further says: "Mr. Smith or anybody

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place, until they rent it we can stay in the meantime for a

certain time."

On this vital point of whether there was a verbal agree-

ment for a thirty-day extension of the lease, we have the

testimony of Beck and Smith against the testimony of defendant.

The preponderance seems to be in favor of plaintiff. The

witnesses for her narrate the more probable story and are

corroborated by facts in evidence establishing plaintiff's theory.

Smith prepared a 10ft lease from the owner to defendant

for a term beginning September 1st and ending September 30, 1945,

at a rental of \$200.00 per month. The leases are in the record

and were mailed to defendant from Beck's office with a letter

dated August 30, 1945. The letter was also mailed on that date.

3.

It said:

" * * * The enclosed lease is for one month from September 1st to September 30th, 1945, with a ten (10) day mutual termination clause, and is at the same rate you are now paying.

* * * You will note that the lease provides that we have the right to show these premises at any time to any prospective new tenant and we expect to avail ourselves of this privilege.

Will you also affix your corporate seal to both copies and along with letter return same to our office immediately for signature.

Very truly yours,

Philip F. W. Peck, Agent."

On the next day, August 31, 1945, defendant mailed its check for \$200.00 to the order of plaintiff's agent, addressed to his office. There was a notation on the check: "Sept. 1945 Rent". The check was put through the bank by plaintiff's agent September 10, 1945, and before any reply from defendant had been received. The letter of Peck with the duplicate leases for thirty days was received and at once sent, by order of defendant's president, to the attorney for defendant. The envelope in which it was received was destroyed at the office of defendant.

September 12, 1945, plaintiff's agent wrote defendant, "Attn. Mr. Nathan L. Goldstein, Secretary and Treas.":

"Under date of August 30th, 1945, I forwarded to you lease for thirty days from September 1st to September 30th, 1945, covering the South half of the fourth floor of the building at 2635-45 South Wabash Avenue, Chicago, Illinois, at a rental of Two Hundred Dollars (\$200.00) for the period of the lease. This lease was sent you after our negotiations for a longer term lease had failed and was in accordance with our verbal understanding that we would give you an additional thirty days in the premises.

Up to this writing, we have not received the signed lease from you, but we have received your check for \$200.00 in payment of the rent under this lease. Will you kindly forward at once the signed lease, as we wish to get this matter disposed of? Please give attention also to the other matters contained

It said:

" * * * The enclosed lease is for one month from September 1st to September 30th, 1945, with a ten (10) day mutual termination clause, and is at the same rate you are now paying.

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sent, by order of defendant's president, to the attorney for

defendant. The envelope in which it was received was destroyed

at the office of defendant.

September 12, 1945, plaintiff's agent wrote defendant,

"Attn. Mr. Nathan L. Goldstein, Secretary and Treasurer."

"Under date of August 30th, 1945, I forwarded to you lease for thirty days from September 1st to September 30th, 1945, covering the South half of the fourth floor of the building at 2335-45 South Wabash Avenue, Chicago, Illinois, at a rental of Two Hundred Dollars (\$200.00) for the period of the lease. This lease was sent you after our negotiations for a longer term lease had failed and was in accordance with our verbal understanding that we would give you an additional thirty days in the premises.

Up to this writing, we have not received the signed lease from you, but we have received your check for \$200.00 in payment of the rent under this lease. Will you kindly forward at once the signed lease, and we wish to get this matter disposed of. Please give attention also to the other matters contained

4.

in our letter of August 30, 1945.

Very truly yours,

Philip F. W. Peck, Agent."

This letter was sent to defendant by registered mail, directed to its office. The receipt of the defendant was mailed September 13, 1945, and is in evidence. It shows with accuracy the possible speed with which a letter from one office to the other could be delivered by mail. Again there was no reply.

These letters, the leases, the check of defendant with notation it was for September rent, the destruction in defendant's office of the envelope in which the leases were enclosed, the failure of defendant to reply to the agent's letters, we hold, establish the existence of a new lease for thirty days, ending on September 30, 1945, beyond a reasonable doubt.

Having found the facts to be as above stated, the legal problem is not difficult to solve.

Defendant argues his cause on two theories. First, that by holding over a new tenancy was created for a like term as under the old lease. The facts are wholly inconsistent with any such inference. Defendant cites Weber v. Powers, 213 Ill. 370, 382. The case is clearly not for, but against it. The opinion says:

"While the legal presumption of a renewal of the tenancy from the holding over of the tenant cannot be rebutted by proof of a contrary intention on the part of the tenant alone, it can be rebutted by proof of a contrary intention on the part of the landlord alone, or on the part of both parties."

There is no doubt here the landlord had no intention that the holding over of defendant should create a new tenancy on the terms and conditions of the old lease, and it is quite clear defendant also understood perfectly that this

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Philip F. W. Beck, Agent."

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There is no doubt here the landlord had no intention that the holding over of defendant should create a new tenancy on the terms and conditions of the old lease, and it is quite clear defendant also understood perfectly that this

5.

was not the intention of the landlord. In Condon v. Brockway, 157 Ill. 90, the Supreme Court said:

"Where a tenant for a year or for years holds over after the term expires, without any new agreement, the landlord, at his election, may treat such tenant as a trespasser, or as a tenant for another year, upon the same terms as in the original lease. But no such right of election belongs to the tenant. (Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151; Keegan v. Kinnare, 123 id. 289)."

To the same effect is Woodstrom v. Freeman, 159 Ill. App. 340, 342.

Defendant's second theory is that the facts as proved created a tenancy from month to month, which would require notice of thirty days to terminate. No thirty day notice was served on defendant here. On oral argument defendant declined to say which of these two theories it relied on. We hold the second untenable as is the first. It is quite true the mere tender of a lease, unsigned and unaccepted by the tenant lessee, would not be binding on the lessee. It was so held in Walsh v. Fallis, 266 Ill. App. 341, and in other cases cited. The present case is, however, quite distinguishable. True, if a tenancy from month to month was created, thirty days' notice by the landlord would have been necessary to terminate it. Ill. Rev. Stat., 1945, Chap. 80, §6; Schilling v. Klein, 41 Ill. App. 209, 210. The holding over here was not by agreement of both parties. The tenant could not on September 1st create a tenancy from month to month by holding possession of the premises, while also holding in his hands a new lease which, though unsigned, showed clearly this was not the intention of the landlord. Here, the defendant received the lease unsigned, placed it in the hands of his lawyer, did not reply to the letter or return the leases, but sent a check for the September rent for the amount named in the new lease, which was also the amount paid under the old one. This may have

as not the intention of the landlord. In Gordon v. Grosvenor, 157 Ill. 90, the Supreme Court said:

"Where a tenant for a year or for years holds over after the term expires, without any new agreement, the landlord, at his election, may treat such tenant as a trespasser, or as a tenant for another year, upon the same terms as in the original lease. But no such right of election belongs to the tenant. (Citation from Gordon v. Grosvenor, 157 Ill. 90; Keenan v. Keenan, 157 Ill. 181; Keenan v. Keenan, 157 Ill. 181.)"

To the same effect is Goodman v. Freeman, 157 Ill. App. 340, 342.

Defendant's second theory is that the facts as proved created a tenancy from month to month, which would require notice of thirty days to terminate. No thirty day notice was served on defendant here. On oral argument defendant declined to say which of these two theories it relied on. It held the second untenable as is the first. It is quite true the mere tender of a lease, unaccepted and unaccepted by the tenant lessee, would not be binding on the lessee. It was so held in Wells v. Wells, 282 Ill. App. 341, and in other cases cited. The present case is, however, quite distinguishable. Time, if a tenancy from month to month was created, thirty days' notice by the landlord would have been necessary to terminate it. Ill. Civ. Stat., 1947, Chap. 60, § 6; Wells v. Wells, 282 Ill. App. 341. The holding over here was not by agreement of both parties. The tenant could not on September 1st create a tenancy from month to month by holding over on the premises, while also holding in his hands a new lease which, though unaccepted, showed clearly this was not the intention of the landlord. Here, the defendant received the lease, unaccepted, placed it in the hands of his lawyer, did not reply to the letter or return the lease, but sent a check for the September rent for the month named in the new lease, which was also the month paid under the old one. This may have

6.

been clever but could not create a tenancy other than that provided for in the proffered written lease.

The judgment will be reversed and the cause remanded with directions to enter judgment for the plaintiff and in due course issue a writ of restitution on the judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and Niemeyer, JJ., concur.

been clever but could not create a tenancy other than that
provided for in the proffered written lease.
The judgment will be reversed and the cause remanded
with directions to enter judgment for the plaintiff and in
due course issue a writ of restitution on the judgment.
REVEREND AND HONORABLE JUSTICE

O'Connor and McKeever, JJ., concur.

43616

GIOVANNI FIORELLA,
Appellant,

v.

LOUISE FIORELLA,
Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

328 I.A. 672

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree dismissing his complaint for divorce, sustaining defendant's cross-complaint for separate maintenance, awarding her \$19 per week for the support and maintenance of herself and four minor children and directing that plaintiff pay defendant an additional sum of \$50 for attorney's fees.

The parties were married in 1912; six children were born, four of whom were minors at the time of the trial. In December 1943 plaintiff filed his complaint alleging desertion by the defendant in October 1937; defendant answered denying the charge of desertion, and in her cross-complaint, filed in May, 1944, for separate maintenance charging plaintiff with cruelty, alleges "That 12 years ago the said cross-defendant left said cross-plaintiff after the Court had placed him on probation for striking said cross-plaintiff." Plaintiff admits striking the defendant, and testified that in March, 1931, the last act of cruelty found in the decree, he struck the defendant, was arrested, found guilty, paid a \$25 fine and was put on six months' probation; that he then left his wife. Defendant and her daughter testified that after the court proceeding and the placing of plaintiff on probation the parties have lived separate and apart.

Plaintiff contends that because of the allegation in the cross-complaint that plaintiff left defendant twelve

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

GIOVANNI FIORELLA,
Appellant,
v.
LOUISE FIORELLA,
Appellee.

8831A.672

THE JUSTICE WITNESS DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree dismissing his complaint for divorce, sustaining defendant's cross-complaint for separate maintenance, awarding her \$10 per week for the support and maintenance of herself and four minor children and directing that plaintiff pay defendant an additional sum of \$50 for attorney's fees.

The parties were married in 1912; six children were born, four of whom were minors at the time of the trial. In December 1943 plaintiff filed his complaint alleging desertion by the defendant in October 1937; defendant answered denying the charge of desertion, and in her cross-complaint, filed in May, 1944, for separate maintenance charging plaintiff with cruelty, alleging "that 12 years ago the said cross-defendant left said cross-plaintiff after the latter had placed his on probation for striking said cross-plaintiff." Plaintiff admits striking the defendant, and testified that in March, 1931, the last act of cruelty found in the decree, he struck the defendant, was arrested, found guilty, paid a fine and was put on six months' probation; that he then left his wife. Defendant and her daughter testified that after the court proceeding and the placing of plaintiff on probation the parties have lived separate and apart.

Plaintiff contends that because of the allegations in the cross-complaint that plaintiff left defendant twelve

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years before the filing of the cross-complaint, ~~that~~ they lived together for one year after the last act of cruelty and therefore cruelty was condoned. This position is untenable. The evidence clearly shows that after the acts of cruelty, committed in March, 1931, the parties have lived separate and apart.

The allowance to defendant for the support and maintenance of herself and four minor children is not excessive.

The decree is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

years before the filing of the cross-complaint, that they
lived together for one year after the last act of cruelty
and therefore cruelty was condoned. This position is
untenable. The evidence clearly shows that after the acts
of cruelty, committed in March, 1931, the parties have
lived separate and apart.

The allowance to defendant for the support and
maintenance of herself and four minor children is not excessive.
The decree is affirmed.

AFFIRMED.

Attest, P. J., and C. Connor, J., clerks.

77988

